A

HANAFI MAT HASSAN

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
RICHARD MALANJUM JCA
AUGUSTINE PAUL JCA
HASHIM YUSOFF JCA
[CRIMINAL APPEAL NO: B-05-19-2002]

C

19 MAY 2006

STATUTORY INTERPRETATION: *Construction of statutes - Deeming provision - Section 90A(6) Evidence Act 1950 - Scope of application - True intent and purport - Whether to be read with s. 90C*
D *of Act - Admissibility of document produced by computer - Deemed to be produced by computer in course of its ordinary use - Whether s. 90A(6) not applicable to document already produced by computer in course of its ordinary use contemplated in s. 90A(1) - Whether applied only to document not produced by computer in course of its ordinary use -*
E *Evidence Act 1950, ss. 90A(1), 90A(2), 90A(4), 90A(6), 90C*

EVIDENCE: *Documentary evidence - Computer printout - Admissibility - Bus ticket - Ticket produced by ticket machine in bus - Whether produced by computer - Whether produced by computer in course of its*
F *ordinary use - Evidence Act 1950, ss. 90A(1), 90A(2)*

EVIDENCE: *Documentary evidence - Computer printout - Admissibility - Bus ticket - Ticket produced by ticket machine - Whether produced by computer - Proof that ticket produced by computer in course of its ordinary use - Whether to be by way of certificate under s. 90A(2)*
G *Evidence Act 1950 - Whether could also be proved by oral evidence - Failure to produce certificate - Whether fatal - Evidence Act 1950, ss. 90A(1), 90A(2), 90A(3), 90A(4)*

EVIDENCE: *Information leading to facts discovered - Admissibility -*
H *Rape and murder - Information leading to discovery of documents belonging to victim - Information given via cautioned statement which was ruled inadmissible - Effect - Whether exhibits wrongly admitted in evidence - Rule as to voluntariness - Whether applicable to a s. 27 confession - Evidence Act 1950, s. 27*

I

EVIDENCE: *Identification evidence - Rape and murder - Identification of victim - Principles - Turnbull principles, applicability of - Whether identity of accused depended wholly or substantially on correctness of identification of victim*

EVIDENCE: *Expert evidence - Chemist - DNA profiling of blood samples - Rape and murder - Whether sufficient to explain matching DNA characteristics in samples analysis - Whether report thereof admissible*

The accused was convicted of the offences of rape and murder respectively. In the words of the learned trial judge, the accused "had mercilessly and brutally raped and murdered the deceased, Noor Suzaily, in the bus WDE 4265 driven by him in the morning of 7 October 2000 at the time and place as stated in the charges". It was not in dispute that the trial judge, in so convicting the accused, had taken into consideration *inter alia* the evidence: (i) of PW25 that the accused was assigned to drive Permata Kiara's bus no. WDE 4265 on the morning of 7 October 2000, and that the bus ticket recovered from Noor Suzaily's bag ('exh. P38D(2)') was issued from the ticket machine of the said bus (ii) of PW5 that he saw Noor Suzaily ('the deceased') with hair disarrayed and without any dress on the upper part of her body knocking on the bus door from the inside as if crying for help; (iii) of PW11, the chemist, who carried out DNA tests on blood samples taken from the accused, prepared the summary of the DNA profiling results thereof ('exh. P17') and confirmed that the semen found in the vagina of the deceased belonged to the accused; and (iv) that documents belonging to the deceased (exhs. P46, P47, P48, P64 & 65) were recovered as a result of information given by the accused.

The evidence apart, it was also apparent that the trial judge, in admitting into evidence exh. P38D(2) pursuant to s. 90A of the Evidence Act 1950 ('the Act'), had dispensed with the need to tender in evidence the certificate under s. 90A(2) on the ground that the ticket machine is a computer and that it had produced P38D(2) in the course of its ordinary use. Likewise, it was the trial judge's opinion – following the Court of Appeal in *Gnanasegaran a/ Pararajasingam v. PP* – that s. 90A(6), by its deeming provision, deemed P38D(2) to be produced by the ticket machine in the course of its ordinary use.

The accused contended that the findings of the trial judge were flawed and unsustainable in law and had hence appealed against the same. Consequently, before the Court of Appeal, arguments were put forth by the accused: (i) that a computer produced document such as exh. P38D(2) could only be admitted under s. 90A if the prosecution proved not only that it was produced by a computer but also that it was produced in the course of its ordinary use and that in order to do so it was incumbent upon the prosecution to produce a certificate as required by s. 90A(2); (ii) that exhs. P17, being a computer printout, could only be admitted in the same manner as exh. P38D(2); (iii) that exhs. P46, P47, P48, P64 & P65 ought not to be admitted in evidence since their recovery under s. 27 of the Act was based on a cautioned statement which had been ruled inadmissible; (iv) that the identification of the photograph of the deceased in the newspaper by PW5 as the person whom he saw in the bus had offended the principles of *R v. Turnbull*; and (v) that the evidence of PW11 on the DNA analysis was wanting in material particulars and ought to be excluded.

Held (dismissing the appeal)
Per Augustine Paul JCA delivering the judgment of the court:

(1) It was implicit in the judgment of Shaik Daud JCA in *Gnanasegaran* that what is required to be proved in order to render a document admissible under s. 90A of the Act are only that it was produced by a computer and that it was produced by the computer in the course of its ordinary use. It was held therein that matters could be proved by the tendering of oral evidence to show that the document was produced by a computer which in turn would activate the presumption in s. 90A(6) that the document was produced by the computer in the course of its ordinary use, or, alternatively, by the tendering of a certificate to establish the same presumed fact. Section s. 90A(6) has thus been construed only as an alternative mode of proof to the use of a certificate. (para 17)

(2) A perusal of s. 90A(1) reveals that a condition precedent need be established before a document produced by a computer could be admitted in evidence, namely that it must have been produced by the computer in the course of its

ordinary use. It is also evident that the manner of establishing this condition has been prescribed, *ie*, by way of tendering in evidence a certificate pursuant to s. 90A(2) read with s. 90A(3). Clearly, once such certificate is tendered in evidence, the presumption contained in s. 90A(4) is activated to show that the computer was in good working order and was operating properly in all respects throughout the material period during which the document was produced. Section 90A(4) thus plays a significant role in the interpretation and application of s. 90A. (para 18)

(2a) The use of the words "may be proved" in s. 90A(2) indicates that the tendering of a certificate is not a mandatory requirement in all cases. Thus, the use of the certificate can be substituted with oral evidence. Such oral evidence, however, must have the same effect as in the case of the use of a certificate. It follows that, where oral evidence is adduced to establish the requirements of s. 90A(1) in lieu of the certificate, the presumptions attached to it, in particular the matters presumed under s. 90A(4), must also be proved by oral evidence. (para 18)

(3) A deeming provision such as s. 90A(6) is a legal fiction and is used to create an artificial construction of a word or phrase in a statute that would not otherwise prevail. Its primary function is to bring something which would otherwise be excluded. By its very nature, it ought to be construed strictly and only for the purpose for which it was created. (para 19)

(4) The purpose of tendering in evidence a certificate under s. 90A(2) is to establish that a document was produced by a computer in the ordinary course of its use. On the other hand, s. 90A(6) deems a document produced by a computer to have been produced by the computer in the course of its ordinary use. Clearly, these two provisions were incompatible and inconsistent with each other. A fact cannot be deemed to have been proved when specific provision has been made for the mode of proof of the same fact. If therefore s. 90A(6) is to function as a substitute for the certificate, it will render nugatory s. 90A(2). This will not accord with the basic rules of statutory construction. Consequently, efforts must be made to reconcile these sub-sections. (para 20)

(5) The true scope of s. 90A(6) will become clear if it is read in the light of s. 90C of the Act. This section provides that ss. 90A and 90B shall prevail over any other provision in the Act thereby making s. 90A the only law under which all documents produced by a computer are to be admitted in evidence. However, there may be instances when a document which is sought to be admitted in evidence may not have been produced by a computer in the course of its ordinary use even though it is one contemplated by s. 90A(1). Such document may be produced by a computer but **may not** have anything to do with the ordinary use of the computer. How is this document to be admitted in evidence – bearing in mind the prevailing effect of s. 90C in making all documents produced by a computer admissible only under s. 90A – if the condition precedent to its admissibility under s. 90A(1) cannot be fulfilled by virtue of it not having been produced by the computer in the course of its ordinary use? It is this question that is answered by s. 90A(6). (para 21)

(5a) Sub-section 90A(6) does not contain the condition precedent and, instead, contains a deeming provision to the same effect. As its purpose is to render a document produced by a computer to be one that is produced by the computer in the ordinary course of its use, it can only apply to a document which is **not** produced by the computer in the ordinary course of its use. It must be so as it is incongruous to deem a document to have been produced by a computer in the ordinary course of its use when the document is already one such document. Consequently, s. 90A(6) can only apply to a document which was **not** produced by a computer in the ordinary course of its use, or, in other words, to a document which does not come within the scope of s. 90A(1). Section 90A(6), thus, has its own purpose to serve and can never be a substitute for the certificate. (para 21)

(5b) The effect of s. 90A(6) is that, once its deeming part becomes applicable to a document which was not produced by a computer in the ordinary course of its use, the condition precedent in s. 90A(1) would have been satisfied in order to render it admissible. However, the requirements

of s. 90A(4) must still be established. This can be done by tendering in evidence the certificate under s. 90A(2) or by way of oral evidence. (para 22)

(6) It follows that the learned trial judge was correct in holding that exh. P38D(2) may be proved by oral evidence. But he has failed to appreciate the matters that require to be proved in following that course. The only findings he made were that exh. P38D(2) was produced by a computer in the course of its ordinary use. He has not considered the matters that must be proved as required by s. 90A(4) in the absence of a certificate having been tendered for such matters to be presumed, namely that: (i) the computer was in good working order, and (ii) it was operating properly in all respects throughout the material part of the period during which the document was produced. The question that must arise is therefore whether there is evidence to establish these requirements. (para 23)

(6a) The evidence as elicited from PW25 is sufficient to show that the ticket machine was in good working condition. With regard to the second requirement, PW25 also said that the two tickets in question had been sold from the machine in the bus driven by the accused in its journey from Kuala Lumpur to Port Klang. The issuance of the tickets by the machine shows that it was operating properly in all respects at all material times. With proof of these two elements, whatever is presumed to exist pursuant to s. 90A(4) has been proved by way of oral evidence. Exhibit P38D(2) is therefore admissible though not on grounds advocated by the learned trial judge. (para 24)

(7) Bearing in mind the definition of "computer" in s. 3 of the Act, all the computers involved in the DNA analysis by PW11 must be treated as one computer. Be that as it may, what requires consideration is whether the computer to be proved for the purposes of s. 90A is exh. P17, which merely recorded the information, or the computers that processed and produced the information. (para 26)

(7a) The prosecution is not seeking to prove the mere recording of the information but the manner in which it was processed in order to obtain the result. In the circumstances, what is relevant is **not** the document produced by the computer

(exh. P17) but the **statements** contained it. It follows that, what requires to be established in order to comply with s. 90A is the **condition** of the computers that produced the results as contained in exh. P17 and **not the computer** itself which produced exh. P17. (para 26)

(7b) In this case, since no certificate was tendered in evidence with regard to the admissibility of the statements in exh. P17, oral evidence is required to establish, firstly the condition precedent in s. 90A(1) in order to show that the statements in exh. P17 were produced by computers in the ordinary course of its use, and secondly the requirements of s. 90A(4). (para 27)

(7c) On the facts, the oral evidence of PW11, including those elicited during his cross-examination, was sufficient to establish this issue. PW11's evidence showed that the DNA analyser and the thermalcycler were calibrated once every six months, and were in good working order. Evidence was further led to show that, to avoid errors in the PCR method of testing, repetitive analysis on the samples was done, and that the machines were also going through their own self-test thereby ensuring that they were running at their optimum level. There was thus sufficient evidence to prove the requirements of s. 90A(4) in the absence of a certificate having been tendered. (paras 27 & 28)

(8) The voluntariness rule does not apply to s. 27 of the Evidence Act 1950. Thus, information relating to facts discovered in consequence of a confession rendered inadmissible by reason of being involuntary is still admissible under s. 27. It follows therefore that exhs. P46, P47, P48, P64 and P65 were correctly admitted in evidence. (para 30)

(9) The *Turnbull* directions are required when the case against an accused person depends wholly or substantially on the correctness of an identification of him which the defence alleges to be mistaken. However, in cases where the disputed evidence is not that of the accused but of another person (such as the case herein), the directions would only apply if the person's identity is relevant to determine the identity of the accused which is in issue. (para 34)

(9a) It is manifestly patent that the identity of the accused does not depend wholly or substantially on the correctness of the identification of the deceased by PW5. It follows that the identification of the deceased by PW5 can be disregarded in arriving at a verdict. The *Turnball* directions therefore have no application in law to the facts of this case. In any event, the other available evidence lends strong support to the identification evidence of PW5 to enable the court to rule that there has been no mistaken identification by him of the deceased as the person whom he saw in the bus. (para 36)

(10) The evidence showed that PW11 had carried out DNA profiling analysis at nine STR genetic loci. He had also explained how the STR method of analysis was carried out. Consequently, exh. P17 is sufficient to explain the matching DNA characteristics in the samples analysis. (para 44)

(10a) As for the random occurrence ratio, PW11's evidence was merely that the probability of a randomly selected individual from the Malaysian Malay population having a matching DNA profile is approximately 85 billion. Ordinarily this evidence would not be sufficient. However, the object of the evidence is to assess the probabilities of another person having a similar match. Therefore, even if another person has a similar match, his involvement in the crime will be negatived if the other evidence is sufficient to connect the accused with the crime. On the facts, the other evidence adduced is sufficient to connect the accused with the crime. (para 44)

[Appeal dismissed; conviction and sentence affirmed.]

Bahasa Malaysia *translation of headnotes*

Tertuduh telah disabitkan dengan kesalahan rogol dan bunuh. Menurut yang arif hakim bicara, tertuduh "dengan secara ganas dan tanpa peri kemanusiaan telah merogol dan membunuh simati, Noor Suzaily, di dalam bas WDE 4265 yang dipandu oleh beliau pada pagi 7 Oktober 2000 pada waktu dan tempat seperti yang tercatit pada pertuduhan". Tidak dinafikan bahawa dalam mensabitkan tertuduh, hakim bicara telah mengambilkira, antara lain, keterangan: (i) SP25 bahawa tertuduh ditugaskan memandu bas Permata Kiara nombor WDE 4265 pada pagi 7 Oktober 2000 dan bahawa tiket bas yang dijumpai dari beg Noor Suzaily ('P38D(2)') adalah dikeluarkan oleh mesen tiket bas tersebut; (ii) SP5 bahawa beliau nampak Noor Suzaily ('simati') dengan rambut

terhurai dan tanpa pakaian di sebelah atas badannya mengetuk-ngetuk pintu bas dari dalam bas seolah-olah menjerit meminta pertolongan; (iii) SP11, iaitu ahli kimia, yang menjalankan ujian DNA terhadap contoh darah yang diambil dari tertuduh, menyediakan ringkasan keputusan profil DNA (eks. P17') dan mengesahkan bahawa mani yang dijumpai di dalam kemaluan simati adalah kepunyaan tertuduh; dan (iv) bahawa beberapa dokumen kepunyaan simati (P46, P47, P48, P64 & P65) telah dijumpai ekoran maklumat yang diberikan tertuduh.

Selain keterangan-keterangan di atas, adalah juga nyata bahawa hakim bicara, dalam menerima-masuk eks. P38D(2) sebagai keterangan di bawah s. 90A Akta Keterangan 1950 ('Akta'), telah mengenepikan keperluan untuk mengemukakan sijil di bawah s. 90A(2) atas alasan bahawa mesen tiket adalah sebuah komputer dan telah mengeluarkan eks. P38D(2) dalam masa penggunaannya yang biasa. Selanjutnya, hakim bicara merumuskan – dengan mengikuti *Gnanasegaran a/l Pararajasingam v. PP* – bahawa s. 90A(6), melalui peruntukan andaiannya, mengandaikan eks. P38D(2) sebagai telah dikeluarkan oleh mesen tiket dalam masa penggunaannya yang biasa.

Tertuduh mengatakan bahawa rumusan dan dapatan yang dibuat oleh hakim bicara adalah cacat dan tidak dapat dipertahankan di sisi undang-undang dan kerana itu telah merayu terhadapnya. Berikutnya, di hadapan Mahkamah Rayuan, tertuduh mengemukakan hujah: (i) bahawa suatu dokumen yang dikeluarkan oleh komputer seperti eks. P38D(2) hanya boleh diterima-masuk di bawah s. 90A sekiranya pendakwaan membuktikan bukan sahaja bahawa ianya dikeluarkan oleh komputer tetapi juga bahawa ia dikeluarkan dalam masa penggunaan biasa komputer tersebut dan untuk itu adalah perlu untuk pendakwaan mengemukakan sijil sepertimana yang dikehendaki oleh s. 90A(2); (ii) bahawa eks. P17 adalah juga suatu cetakan komputer dan dengan itu harus diterima-masuk dengan cara yang sama seperti eks. P38D(2); (iii) bahawa eks. P46, P47, P48, P64 & P65 sepatutnya tidak diterima-masuk oleh kerana penemuannya di bawah s. 27 Akta adalah berdasar kepada kenyataan beramaran yang telah ditolak kemasukannya; (iv) bahawa pengecaman gambar simati di dalam akhbar oleh SP5 sebagai orang yang beliau lihat di dalam bas telah melanggar prinsip *R v. Turnbull*; dan (v) bahawa terdapat banyak kekurangan pada keterangan SP11 berkaitan analisa DNA di mana keterangan tersebut seharusnya ditolak.

Diputuskan (menolak rayuan)
Oleh Augustine Paul HMR menyampaikan penghakiman mahkamah:

(1) Adalah nyata dari penghakiman Shaik Daud HMR di dalam *Gnanasegaran* bahawa apa yang perlu dibuktikan untuk sesuatu dokumen diterima-masuk di bawah s. 90A Akta hanyalah bahawa pertama ianya dikeluarkan oleh komputer dan kedua ia dikeluarkan oleh komputer tersebut dalam masa penggunaanya yang biasa. Ianya diputuskan di situ bahawa halperkara boleh dibuktikan dengan cara mengemukakan keterangan lisan bahawa dokumen dikeluarkan oleh komputer yang mana ianya akan membangkitkan andaian di bawah s. 90A(6) bahawa dokumen dikeluarkan oleh komputer dalam masa penggunaannya yang biasa, atau, secara alternatifnya, dengan mengemukakan sijil bagi membuktikan andaian fakta yang sama. Seksyen 90A(6), dengan itu, telah ditafsir sebagai pembuktian alternatif kepada penggunaan sijil.

(2) Meneliti s. 90A(1) menunjukkan bahawa satu syarat duluan perlulah dibuktikan sebelum sesuatu dokumen yang dikeluarkan oleh komputer boleh diterima-masuk sebagai keterangan, iaitu bahawa ia mestilah dikeluarkan oleh komputer dalam masa penggunaanya yang biasa. Juga jelas bahawa peruntukan juga dibuat mengenai cara bagaimana syarat ini harus dibuktikan, iaitu dengan cara mengemukakan sijil di bawah s. 90A(2) dibaca bersama dengan s. 90A(3). Jelas bahawa sebaik sahaja sijil dikemukakan, andaian yang terkandung di dalam s. 90A(4) akan berbangkit bagi membuktikan bahawa komputer berada di dalam keadaan baik dan beroperasi dengan baik dalam setiap aspek dalam seluruh tempoh masa di mana dokumen dikeluarkan. Seksyen 90A(4), dengan itu, memain peranan penting dalam pentafsiran and aplikasi s. 90A.

(2a) Penggunaan perkataan "may be proved" di dalam s. 90A(2) menunjukkan bahawa pengemukaan sijil bukanlah sesuatu yang mandatori dalam semua kes. Oleh yang demikian, penggunaan sijil boleh diganti dengan keterangan lisan. Bagaimanapun, keterangan lisan sedemikian hendaklah memberi kesan yang sama seperti penggunaan sijil. Ianya mengikut bahawa, di mana keterangan lisan digunakan untuk memenuhi kehendak s. 90A(1) sebagai ganti sijil, andaian-

andaian yang terlekat padanya, terutama hal-hal yang diandai di bawah s. 90A(4), hendaklah juga dibuktikan melalui keterangan lisan.

(3) Peruntukan mengandai seperti s. 90A(6) adalah satu fiksyen undang-undang dan adalah digunakan bagi mewujudkan pentafsiran tiruan terhadap sesuatu perkataan atau ungkapan di dalam statut yang sebaliknya tidak wujud. Fungsi utamanya adalah untuk membangkitkan sesuatu terhadap apa yang sepatutnya diketepikan. Mengambilkira sifatnya yang sedemikian rupa, ia hendaklah ditafsir secara ketat dan semata-mata untuk tujuan ianya digubal.

(4) Tujuan mengemukakan sijil sebagai keterangan di bawah s. 90A(2) adalah untuk membuktikan bahawa ia dikeluarkan oleh komputer semasa penggunaannya yang biasa. Seksyen 90A(6), dalam pada itu, mengandaikan dokumen yang dikeluarkan oleh komputer sebagai dikeluar dalam masa penggunaannya yang biasa. Jelaslah bahawa kedua-dua peruntukan ini bertentangan dan tidak konsisten di antara satu sama lain. Suatu fakta tidak boleh diandai sebagai telah dibuktikan di mana peruntukan spesifik dibuat sebagai satu cara membuktikan fakta yang sama. Maka itu, sekiranya s. 90A(6) dikatakan berfungsi sebagai pengganti kepada sijil, ia akan menyebabkan s. 90A(2) menjadi sia-sia. Ini tidak selari dengan kaedah asas pentafsiran statut dan dengan itu suatu kaedah harus dicari bagi menyelaraskan subseksyen-subseksyen ini.

(5) Ruang sebenar s. 90A(6) akan menjadi jelas jika ia dibaca dalam konteks s. 90C Akta. Seksyen ini memperuntukkan bahawa ss. 90A dan 90B mengambil keutamaan ke atas mana-mana peruntukan lain Akta, sekaligus menjadikan s. 90A sebagai satu-satunya peruntukan undang-undang di bawah mana dokumen-dokumen yang dikeluarkan oleh komputer boleh diterima-masuk sebagai keterangan. Bagaimanapun, keadaan mungkin berbangkit di mana sesuatu dokumen yang hendak dikemukakan sebagai keterangan tidak dikeluarkan oleh komputer dalam masa penggunaannya yang biasa seperti yang dibayangkan oleh s. 90A(1). Bagi dokumen seperti itu, walaupun ia dikeluarkan oleh komputer, ia **tidak** kena mengena dengan penggunaan biasa komputer tersebut. Maka itu, berbangkit persoalan bagaimanakah dokumen seperti ini hendak diterima-masuk sebagai keterangan –

mengambilkira kesan s. 90C yang mengkehendaki semua dokumen yang dikeluarkan oleh komputer hanya boleh diterima-masuk di bawah s. 90A – jika syarat duluan kepada kemasukannya di bawah s. 90A(1) tidak dapat dipenuhi disebabkan ia tidak dikeluarkan oleh komputer dalam masa penggunaanya yang biasa? Persoalan inilah yang dijawab oleh s. 90A(6).

(5a) Sub-seksyen 90A(6) tidak mengandungi syarat duluan tetapi sebaliknya mengandungi peruntukan andaian, walaupun kesannya adalah sama. Oleh kerana tujuannya adalah untuk menjadikan sesuatu dokumen yang dikeluarkan oleh komputer sebagai dikeluarkan oleh komputer dalam masa penggunaannya yang biasa, ia hanya boleh terpakai kepada suatu dokumen yang **tidak** dikeluarkan oleh komputer dalam masa penggunaannya yang biasa. Keadaannya semestinyalah begitu oleh kerana adalah janggal untuk mengandaikan suatu dokumen sebagai dikeluarkan oleh komputer dalam masa penggunaannya yang biasa jika dokumen itu sememangnya dokumen yang sedemikian rupa. Oleh yang demikian, s. 90A(6) hanya boleh terpakai kepada dokumen yang tidak dikeluarkan oleh komputer dalam masa penggunaanya yang biasa, atau, dalam kata lain, kepada dokumen yang **tidak** terangkum ke dalam skop s. 90A(1). Seksyen 90A(6), dengan itu, mempunyai maksud dan tujuannya yang tersendiri dan tidak mungkin boleh menjadi pengganti kepada sijil.

(5b) Kesan s. 90A(6) adalah bahawa, sebaik sahaja peruntukan andaiannya terpakai kepada dokumen yang tidak dikeluarkan oleh komputer dalam masa penggunaannya yang biasa, syarat duluan di bawah s. 90A(1) dengan sendirinya dipenuhi sekaligus menjadikannya boleh diterima-masuk sebagai keterangan. Walau bagaimanapun, keperluan s. 90(4) masih juga perlu dibuktikan. Ini boleh dibuat dengan cara mengemukakan sijil di bawah s. 90A(2) ataupun melalui keterangan lisan.

(6) Ianya mengikut bahawa yang arif hakim betul dalam memutuskan bahawa eks. P38D(2) boleh dibuktikan melalui keterangan lisan. Namun begitu, beliau gagal mengambilkira perkara-perkara yang perlu dibuktikan bila mengambil jalan tersebut. Dapatan yang dibuat oleh beliau hanyalah bahawa eks. 38D(2) telah dikeluarkan oleh komputer dalam masa penggunaannya yang biasa. Beliau tidak mempertimbang

perkara-perkara yang perlu dibuktikan sepertimana peruntukan s. 90A(4) dalam keadaan di mana sijil tidak dikemukakan bagi membolehkan perkara-perkara tersebut diandaikan, iaitu: (i) komputer tersebut berada dalam keadaan baik; dan (ii) ia beroperasi dengan baik dalam segala aspek dalam tempoh material di mana dokumen tersebut dikeluarkan. Persoalan yang berbangkit, dengan itu, adalah sama ada terdapat keterangan bagi membuktikan perkara-perkara ini.

(6a) Keterangan seperti yang diberi oleh SP25 adalah mencukupi bagi membuktikan bahawa mesen tiket berada dalam keadaan baik. Berhubung syarat kedua, SP25 juga menyatakan bahawa kedua-dua tiket berkenaan adalah dijual dari mesen tiket di dalam bas yang dipandu oleh tertuduh ketika dalam perjalanan dari Kuala Lumpur ke Port Klang. Pengeluaran tiket oleh mesen menunjukkan bahawa ia beroperasi dengan baik dalam segala aspek pada waktu material. Dengan bukti kedua-dua perkara ini, segala apa yang diandaikan wujud di bawah s. 90A(4) telah dibuktikan melalui keterangan lisan. Eksibit P38D(2) dengan itu boleh diterima-masuk walaupun bukan atas alasan seperti yang diutarakan yang arif hakim bicara.

(7) Berdasarkan definasi "komputer" di dalam s. 3 Akta, kesemua komputer yang terlibat dalam ujian DNA hendaklah dianggap sebagai sebuah komputer. Apapun, yang memerlukan pertimbangan adalah sama ada komputer yang perlu dibuktikan bagi maksud s. 90A adalah eks. P17, yang hanya merekod maklumat, ataupun komputer-komputer yang memproses dan mengeluarkan maklumat tersebut.

(7a) Pihak pendakwaan tidak berhasrat untuk membuktikan pencatatan maklumat semata-mata, tetapi lebih kepada cara bagaimana maklumat tersebut diproses bagi mencapai keputusan. Oleh yang demikian, apa yang relevan **bukanlah** dokumen yang dikeluarkan oleh komputer (eks. P17), tetapi **maklumat-maklumat** itu sendiri. Ianya mengikut bahawa, apa yang perlu dibuktikan bagi mematuhi s. 90A adalah **keadaan** komputer yang mengeluarkan keputusan yang terkandung di dalam eks. P17, dan **bukannya komputer itu** sendiri yang mengeluarkan eks. P17.

(7b) Dalam kes ini, oleh kerana tiada sijil dikemukakan berkaitan penerimaan-masuk kenyataan di dalam eks. P17, keterangan lisan diperlukan untuk membuktikan, pertama, syarat duluan s. 90A(1) bagi menunjukkan bahawa kenyataan-kenyataan di eks. P17 dikeluarkan oleh komputer dalam masa penggunaannya yang biasa, dan kedua, kehendak-kehendak s. 90A(4).

(7c) Di atas fakta, keterangan lisan SP11, termasuk yang diberikan sewaktu pemeriksaan balasnya, adalah mencukupi untuk membuktikan isu ini. Keterangan SP11 menunjukkan bahawa analyser DNA dan thermalcycler diuji setiap enam bulan sekali dan adalah dalam keadaan baik. Keterangan juga dikemukakan bagi membuktikan bahawa, bagi mengelakkan kesilapan pada kaedah ujian PCR, analisa tubian telah dibuat ke atas contoh-contoh. Mesen-mesen tersebut juga teruji dengan sendiri bagi mempastikan bahawa ia beroperasi pada tahap optima. Dengan itu terdapat keterangan yang mencukupi bagi memenuhi kehendak s. 90A(4) dalam ketiadaan sijil dikemukakan.

(8) Kaedah kesukarelaan tidak terpakai kepada s. 27 Akta Keterangan 1950. Oleh itu, maklumat mengenai penemuan fakta yang diberi dalam satu pengakuan yang ditolak kerana tidak diberikan dengan sukarela masih boleh diterima-masuk di bawah s. 27. Eksibit P46, P47, P48, P64 & P65, dengan itu, telah diterima-masuk dengan teratur.

(9) Arahan *Turnbull* adalah perlu jika kes terhadap tertuduh bergantung keseluruhannya atau sebahagian besarnya kepada ketepatan pengenalan tertuduh yang dicabar oleh pembelaan tersebut. Di dalam kes di mana keterangan yang disangkal tidak menyangkuti tertuduh tetapi seorang orang lain (sepertimana kes di sini), arahan hanya terpakai jika identiti orang tersebut relevan bagi menentukan identiti tertuduh yang menjadi isu.

(9a) Adalah nyata bahawa identiti tertuduh tidak bergantung sama ada sepenuhnya atau sebahagian besarnya kepada ketepatan pengecaman simati oleh SP5. Ianya mengikut bahawa, untuk mencapai keputusan, pengecaman simati oleh SP5 adalah tidak penting. Arahan *Turnbull* dengan itu tidak terpakai kepada fakta kes di sini. Walau apapun, keterangan-keterangan lain menyokong kuat keterangan pengecaman SP5

A sekaligus membolehkan mahkamah memutuskan bahawa tidak berlaku sebarang salah cam simati sebagai orang yang dilihat oleh SP5 di dalam bas tersebut.

(10) Keterangan menunjukkan bahawa SP11 telah melakukan B analisa profiling di sembilan loci genetic STR. Beliau juga menjelaskan bagaimana kaedah analisa STR dijalankan. Oleh itu, eks. P17 adalah memadai untuk menjelaskan ciri-ciri DNA menyerupai di dalam analisa contoh.

C **(10a)** Berhubung nisbah rambang kejadian, keterangan SP11 hanyalah bahawa kemungkinan seorang lelaki Malaysia berbangsa Melayu mempunyai profil DNA yang serupa adalah lebih kurang satu dalam 85 bilion. Keterangan ini biasanya tidak mencukupi. Namun, tujuan keterangan ini adalah untuk menilai kemungkinan seorang lain mempunyai D profil yang serupa. Oleh itu, jikapun terdapat seorang lain yang mempunyai profil yang serupa, keterlibatannya di dalam jenayah boleh ditolak jika keterangan-keterangan lain yang ada mencukupi untuk menghubungkan tertuduh kepada jenayah. Berdasarkan fakta, keterangan-keterangan lain yang E dikemukakan mencukupi untuk menghubungkan tertuduh dengan jenayah.

[Rayuan ditolak; sabitan dan hukuman dikekalkan.]

F **Case(s) referred to:**

AG for Quebec v. Begin [1955] SCR 593 ***(refd)***

Ashok Ambu Parmar v. Commr of Police, Badodara City AIR [1987] Guj 147 ***(refd)***

CIT Bombay v. Bombay Corporation AIR [1930] PC 54 ***(refd)***

CIT Bombay City II v. Shakuntala AIR [1966] SC 719 ***(refd)***

G *Doheny and Adams v. R [1997] 1 Cr App R 369* ***(refd)***

FCT v. Comber [1986] 64 ALR 451 ***(refd)***

Francis Antonysamy v. PP [2005] 2 CLJ 481 FC ***(refd)***

Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 CA ***(refd)***

In ex p Walton, In re Levy [1881] 17 Ch D 746 ***(refd)***

H *In re Coal Economising Gas Company [1875] 1 Ch D 182* ***(refd)***

Jason Cape & Ors v. R [1996] 1 Cr App R 191 ***(refd)***

Kuruma v. R [1955] AC 197 ***(refd)***

Madanlal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd AIR [1962] 1543 ***(refd)***

Malaysia Building Society Bhd v. Lim Kheng Kim & Ors [1988] 1 CLJ 675; I *[1988] 1 CLJ (Rep) 770 HC* ***(refd)***

PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Kalaiselvan [2001] 2 MLJ 157 ***(refd)***
PP v. Mohd Farid Mohd Sukis & Anor [2002] 3 MLJ 401 ***(refd)***
R v. Apicella [1986] 82 Cr App R 295 ***(refd)***
R v. Court [1962] Crim LR 697 ***(refd)***
R v. Fox [1986] AC 281 ***(refd)***
R v. Mc Namara [1951] 99 CCC 107 ***(refd)***
R v. Payne [1963] 3 All ER 848 ***(refd)***
R v. Sang [1980] AC 402 ***(refd)***
R v. Shepherd [1993] 1 All ER 225 ***(refd)***
R v. Turnbull [1977] 1 QB 224 ***(refd)***
Shital Rai v. State of Bihar AIR [1991] Pat 110 ***(refd)***
Wong Kamming v. The Queen [1979] 1 All ER 705 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 3, 24, 27, 90A(1), (2), (4), (6), 51, 90C, 96A(3)

Other source(s) referred to:
Andrews & Hirst, *Criminal Evidence,* 4th edn, pp 293, 294
Bindra's, *Interpretation of Statutes,* 9th edn, p 72
May and Powles, *Criminal Evidence,* 5th edn, p 400
Ramanatha Aiyar, *The Law Lexicon,* 7th Reprint edn, p 302

For the appellant - Sreekant Pillai (Amir Hamzah with him); M/s Sreekant Pillai
For the respondent - Kamaruzaman Ab Jalil DPP

Reported by WA Sharif

JUDGMENT

Augustine Paul JCA:

[1] In this case the accused was charged in the High Court with the rape and murder of one Noor Suzaily binti Mukhtar ("the deceased") on 7 October 2000. He claimed trial to both the charges. The prosecution called a total of 54 witnesses in support of its case while the defence case rested solely on the evidence of the accused. The learned trial judge found him guilty on both the charges. He was convicted and sentenced to death in respect of the murder charge and to 20 years' imprisonment and whipping of 12 strokes of the rotan in respect of the rape charge. This is his appeal against both the convictions and sentences.

[2] In his grounds of judgment the learned trial judge had summarised in some detail the evidence adduced by the prosecution and the defence. He first dealt with the material evidence led by the prosecution. Dr Halim bin Mansar (PW23), a pathologist, carried out a postmortem on the deceased. He found a fresh tear on her hymen. With regard to the murder charge the conclusion of PW23 is as follows:

> Death came as a result of ligature strangulation and blunt trauma to the head.

Based on the evidence of PW23, the learned trial judge was satisfied that the injuries inflicted on the deceased showed that she had been raped and that penetration had occurred without her consent. He was also satisfied that the injuries had caused her death, and that the person who had caused the injuries did so with the intention of causing her death. In determining the person who had raped and murdered the deceased the learned trial judge's summary of the evidence runs as follows. The forensic expert from the Department of Chemistry, Encik Primulapathi (PW11), carried out a DNA test on a blood sample (P12A) from the accused and on the vaginal swabs (P29 and P29B; P30A and P30B) of the victim. The result of the DNA test showed that the semen of the accused was found in the vagina of the deceased. Of all the evidence tendered by the prosecution the learned trial judge found this to be the most incriminating against the accused. Puan Hammidah bt Shaari (PW22), the General Manager of Pantai Medical Centre, Kuala Lumpur, testified that the deceased was an officer of the Pantai Medical Centre and was assigned to set up a Laboratory Information Centre at the Klang office of the Pantai Medical Centre. Encik Ganeshi a/l Subramaniam (PW31) was a medical laboratory technologist at the Klang branch of the Pantai Medical Centre where the deceased worked. He said that the deceased was sent to the Klang office from the head office at Jalan Bukit Pantai, Kuala Lumpur, to train the staff on the use of computers. He testified that the deceased came to work on 6 October 2000 and that was the last time he saw her. He said that the deceased had told him that she would be coming to work on the next day, that is, Saturday 7 October 2000, but did not turn up. Cik Rosmaliza binti Umar (PW7) was the room mate of the deceased at the PKNS flat in Kampong Baru, Kuala Lumpur, where they lived. She said that on 7 October 2000, at about 7am the deceased left the flat to go to work. Devan (PW5), a school pupil, said that on the morning of 7 October 2000, at about

8.45am he saw a bus bearing registration number WDE 4256 with the name "Kiara Express" on it at Jalan Pegaga, in Taman Chi Liung. At that time PW5 was riding a bicycle and was on his way to attend tuition class. He said that through the glass panel at the passenger door of the bus he saw a woman inside. The woman was without any dress on the upper part of her body and her hair was in disarray. She appeared to be frantic. She was knocking on the door of the bus from the inside as if she was crying for help. Then PW5 saw the bus moving away from Jalan Pegaga and heading towards Jalan Sambau where it stopped. He and another person on a motorcycle chased the bus right until Jalan Sambau. At Jalan Sambau PW5, the motorcyclist, and two other men approached the bus. When PW5 came close to the bus he saw through the glass panel at the passenger door the bus driver walking towards the driver's seat; and while walking, he was pulling up his trousers. When the bus driver realised the presence of PW5 and the others he drove his bus away from Jalan Sambau. Encik Ahmad Ali bin Sidek (PW36), a vehicle examiner at PUSPAKOM, testified that on 14 October 2000 he had examined bus bearing registration number WDE 4256 at the request of the police. He found that the bus had only three doors, namely, the driver's door, the passenger door and the emergency door. The driver's door was located at the front of the bus to the right of the driver's seat. The passenger door was located at the rear, on the right-hand side of the bus. The driver's door and the emergency door were manually operated. The passenger door was hydraulically powered and was of the automatic folding type and could be opened or closed only by the driver of the bus. The 'open'/'closed' button for the door was located near the driver's seat. The passenger door could not be independently opened or closed by the passengers. PW36 discovered that the emergency door was locked and could not be opened either from inside or outside the bus.

[3] Three Indonesian workers at the site of a housing project at Bukit Tinggi, namely, Encik Habsa (PW8), Encik Frederikus (PW9) and Encik Marselinus (W10) said that on 7 October 2000, at about 9am, they saw the accused driving a bus into the area of the project. The bus stopped for about 30 minutes. The accused was seen behaving suspiciously. PW9 and PW10 said that they spoke to the accused. He appeared to be agitated and evasive when asked about his presence at the site. The evidence of PW9 gave a clear picture of the behaviour, conduct and the state of mind of the accused. As he said:

Pada tanggal 7-10-2000, jam lebih kurang 9.00 pagi, semasa saya pergi berkerja saya nampak sebuah bas masuk dan berhenti di tepi jalan. Saya kira bas masuk untuk buat operasi. Dia berhenti begitu lama lebih kurang setengah jam. Dan saya ajak sama kawan saya Marsel dan saya bertanya kepada Marsel:

Basnya berhenti begitu lama.

Tak lama kemudian, pintu bas terbuka seperti membuang pakaian perempuan dari pintu keluar-masuknya penumpang. Setelah itu, pintunya ditutup and bas itu berjalan terus. Selepas itu saya ajak kawan saya Marsel pergi ke tempat pembuangan pakaian, setelah sampai di sana pakaian itu adalah milik pakaian perempuan. Setelah itu, kami mendekati bas itu, bas sudah pusing mahu masuk jalur (laluan) sebelahnya. Setelah itu dia berhenti di loji. Kami dekati terus bas itu. Nampak kami hampir dekat, si drebar turun dari pintu keluarnya penumpang. Saya nampak seperti mahu kencing. (Witness requests that he be allowed to stand.) Setelah saya mendekati bas, dia berdiri seolah seperti menarik zip seluarnya. (Witness demonstrates.) Setelah saya hampir mendekati bas, dia naik semula bas melalui tempat turun naiknya penumpang. Setelah itu dia duduk di tempatnya drebar. Selepas itu saya bercakap sama itu drebar. Saya tanya itu drebar:

Apasal engkau dekat sini?

Lalu dia jawab:

Aku nak relakslah.

Selepas itu saya tanya lagi:

Mana boleh engkau relaks tempat kontrak ini macam, lebih elok engkau relaks dekat luarlah.

Selepas itu si drebar menanyakan saya:

Apasal engkau tak kerja?

Saya menjawab:

Saya kerja. Masuk pukul 10, sebab paginya hujan gerimis.

Selepas itu, dia bising dengan kawan saya Marsel:

Pergilah! Pergilah!

Macam itu, lalu saya menjawab:

Buat apa engkau suruh saya pergi?

> Semasa saya bertanya si drebar, raut wajahnya berubah seperti mukanya pucat. Selepas itu, dia jalankan bas, agak-agak 200 meter dia berhenti lagi. Dia tengok lagi belakang seperti kami mahu ikut lagi arah bas itu. Pada saat itu, kami mengikuti bas dengan berjalan kaki. Setelah sampai di simpang empat, nampak bas sudah keluar ke lampu trafik light.

PW9 and PW10 saw some objects being thrown out of the bus and later a long skirt (P11A), a long sleeve T-shirt (P12A), a bra (P13A) and a panty (P14A) were recovered from where they were thrown. Puan Harison (PW12), the mother of the deceased, identified exhs. P11A and P12A as clothings belonging to the deceased.

[4] On 7 October 2000, at about 3pm, Encik Radzlin bin Thani (PW2), an engineer employed at the site of the Bukit Tinggi project and Encik Mohamad Ali bin Malek (PW3), a supervisor of the project, came across the body of the deceased at the site of the project, lying naked by the side of a road which was then still under construction. The place where the body was found was not far from the place where the accused had stopped his bus earlier in the morning and also not far from the place where the clothings of the deceased were found. PW2 telephoned the police. Later a police patrol car came to the scene. On 10 October 2000 Detective Corporal Sukdarshan Singh (PW45) arrested the accused at Port Klang. At the time of arrest, the accused was seated in the bus bearing registration number WDE 4256, with the name "Kiara Express" on it. The accused was taken to the Klang District Police Headquarters. While conducting a body search on the accused PW45 found a Motorola Star Tac hand-phone (P39) on him. There was evidence to show that it belonged to the deceased. PW45 also found on the accused a cash sale receipt (P71) dated 7 October 2000 with the words "1 Sim Pack, 1 travel charger" written on it.

[5] The deceased's fiancé, Rudy Shahrin (PW14), testified that he and the deceased did a foundation course together at the Twin Tect Institute of Technology, Old Klang Road, Kuala Lumpur. Later both of them proceeded to the United Kingdom to pursue their degree course. While in the United Kingdom PW14 bought a Star Tac hand-phone for the deceased. He identified exh. P39 as the hand-phone. Chief Inspector Raduan (PW33) said that on the night of 10 October 2000, at about 8.30pm the accused led him and several other police officers to a place near a road divider in front of the Majlis Perbandaran Kelang where he

had thrown away several documents. PW33 found the documents lying in a drain. The documents recovered were a Bank Muamalat savings account book (P47), a Citibank Mastercard (P46), a Wadiah Maybank savings account book (P48), and the identity card (P46) of the deceased. Evidence (which remained unchallenged) was adduced through PW18 (a bank officer from Citibank), PW19 (a bank officer from Bank Muamalat), PW20 (a bank officer from Maybank) and PW34 (an officer from the National Registration Department) to prove that these documents belonged to the deceased. Chief Inspector Shaimah (PW54), the Investigating Officer of the case, testified that on the night of 10 October 2000 while she was at the house of the accused she saw and seized a pendant (P36). She discovered it in a powder bottle placed behind the door of a bedroom. It was identified as belonging to the deceased by PW12. Encik Shahim bin Mahsen (PW15), a postman with Pos Malaysia and attached to the Bukit Raja office, testified that on the morning of 7 October 2000, while passing along Lebuh Keluli on the way to work at Bukit Raja, he saw a black bag (P38A) lying by the side of the road. Subsequently, and as a result of inquiries made by him based on a phone number written on a Citibank slip (P81) which was in the bag, he handed over the bag to PW14. The road known as Lebuh Keluli is situated close to the workshop of Permata Kiara and it is this particular road that was normally used by buses of Permata Kiara when returning to the workshop. PW14 said that he found exh. P81 in exh. P38A – and on the bank slip was a handwritten phone number which he identified as the house phone number of the deceased. He identified the handwriting of the phone number as that of the deceased. PW14 also found in the bag a make-up set (P38C) and several bus tickets (P38D(1), P38D(2) and P38E). Among the items found in exh. P38A was also a file (P38B). PW22 recognised the information contained in the file as pertaining to the work that was being carried out by the deceased in the Laboratory Information Centre at the Klang office.

[6] Permata Kiara Sdn Bhd and Ardent Link Sdn Bhd were two bus companies that operated a to and fro bus service from Port Klang to Kuala Lumpur *via* Klang. They shared a common workshop and office premises at Bukit Raja, Klang. These two companies also shared the same employees, including bus drivers, to operate their respective bus services. The evidence of the employees of these two bus companies, namely, Encik Lim Ah Bah (PW25), an operation supervisor, Encik Chang Khin Aun (PW26),

an operation assistant, Encik Pong Yin Fong (PW27), an operation supervisor, Encik Chin Teck Hua (PW37), a mechanic, and Cik Lim Yee Lian (PW38), a clerk confirmed that the accused was at the material time one of the drivers in Permata Kiara Sdn Bhd; and that in the morning of 7 October 2000 he was the driver of a bus of the company bearing registration number WDE 4256. On that day, the accused was assigned the duty of driving the bus from Port Klang to Kuala Lumpur and back. PW25 also confirmed that the Taman Chi Liung and Bukit Tinggi areas did not come within the designated route of the accused. PW26 prepared the duty roster (P56) of the bus drivers for 7 October 2000. According to exh. P56 the accused was supposed to start work at 6.40am and the bus bearing registration number WDE 4256 was allotted to him for the route from Port Klang to Kuala Lumpur and back.

[7] PW25, in his evidence, explained to the court the daily duties of a driver. Every driver of a Permata Kiara bus would be given a driver key and a four digit code number for the operation of the ticket machine installed in each of the buses. The accused was given a driver key (P53) and the code number "6095" for the machine. The ticket machine was located at the front area of the bus near the driver's seat. A driver commences his daily work by using the driver key to switch on the ticket machine. After that the driver would have to key-in his code number. At the commencement of the daily work every driver is required to produce a report known as the "status report" from the ticket machine. When the driver had completed his shift at the end of the day he has to produce from the ticket machine another document known as the "shift report". The status report and the shift report must be submitted to a clerk at the office of the workshop by the driver together with another document known as the waybill for the purpose of claiming his wages. In the present case the accused submitted the status report (P50), shift report (P51) and waybill (P52) for work done on 7 October 2000. They were placed by the accused on the table of the clerk of Ardent Link, Cik Lim Yee Lian (PW38). According to PW25 the ticket machine also produced tickets for passengers boarding the bus. When a passenger boarded the bus he would pay the fare to the bus driver. He would then press the appropriate button on the ticket machine to denote the amount of the fare paid and cause the ticket machine to produce a ticket for the passenger. The driver would then give the ticket to the passenger concerned.

Each ticket issued carried a serial number. PW25 identified exh. P38D(2) as one of the tickets normally issued by a ticket machine installed on the buses of his company. In respect of ticket exh. P38D(2) PW25 explained what the information printed on the ticket meant. The figure "010956" printed on the ticket denotes the serial number of the ticket. The figures "07/10/00" and "08:00" on the ticket indicate the date and time the ticket was issued. It was issued to the passenger on 7 October 2000 at 8am. The word "RM2" was the fare paid by the passenger for the ticket. The letter "D" printed on the ticket denotes that the fare paid was for an adult passenger. The letter "T" printed on the ticket denotes the trip intended to be taken by the holder of the ticket ie, from Kuala Lumpur to Port Klang. The word "P.Kiara" is Permata Kiara denoting the bus service provided by his company. The word "K.Lumpur" shows the station where the passenger to whom the ticket was issued boarded the bus. The word "R008" shows the route assigned to the bus in question ie, from Port Klang to Kuala Lumpur and back.

[8] The learned trial judge observed that the ticket by itself does not show that it was issued by the accused; nor does it show that it was issued from bus bearing registration number WDE 4256. Encik Ng Ho Peng (PW35) who was employed as a cashier by Permata Kiara at the material time testified that among his duties as a cashier was to collect from the cash box located near the driver's seat of every bus the daily collection from the sales of bus tickets. This was done in the evenings after the buses had finished their trips. He had to use a special key to open the boxes. The cash collected from each bus is put in a special bag, one bag for each bus. When collecting the cash from a bus, he would also have to produce by using a driver's key and a special code number a report known as the "TLO report" from the ticket machine. According to PW35, "TLO" stands for "Ticket Liaison Officer". The TLO report would also have to be put in the respective bag together with the cash. The TLO report (P58) from bus bearing registration number WDE 4256 was produced by PW35 from the ticket machine. It was produced on 7 October 2000 at 7.30pm. The information contained in exh. P58 shows the connection between the TLO report and the ticket exh. P38D(2). The information contained in the TLO report are:

(a) the date when the TLO report was produced by PW35, which is 7 October 2000;

(b) the time when the TLO report was produced, which is 7.30pm;

(c) the code assigned to the driver of the bus on 7 October 2000, which is 6095;

(d) the time the driver of the bus keyed in his code number, which is, 7.51am;

(e) the number of the ticket machine being used, which is, 97450286;

(f) the registration number of the bus in question, which is WDE 4256;

(g) the serial numbers of the tickets issued by the bus on 7 October 2000, namely, 10956 and 10957 (meaning that there were only two tickets issued for that particular trip);

(h) the route code number 008, referring to the Kuala Lumpur-Port Klang-Kuala Lumpur route;

(i) that, for the particular trip, the bus started from Kuala Lumpur.

The information on the TLO report, when read together with the information on exh. P38D(2), shows that this particular ticket was issued by the accused on board the bus bearing registration number WDE 4256 on 7 October 2000 at 8am at Kuala Lumpur. PW35 explained that the TLO report also showed the number of tickets issued by the accused for the trip from Kuala Lumpur to Port Klang on the morning of 7 October 2000. In the present case the TLO report showed that only two tickets were issued by bus bearing registration number WDE 4256 in respect of the particular morning trip from Kuala Lumpur to Port Klang on 7 October 2000 ie, ticket bearing numbers 10956 (P38D(2)) and 10957. PW35 testified that on 7 October 2000, apart from producing a TLO report from the ticket machine on bus bearing registration number WDE 4256, he also produced another report known as the audit report (PW69) from the same machine. This audit report was related to the TLO report.

[9] After considering the evidence as enumerated above the learned trial judge made the following inferences and findings of fact:

(1) On 7 October 2000, at about 7.30 in the morning, Noor Suzaily left her PKNS flat in Kampong Baru, Kuala Lumpur, to go to her place of work at Klang.

(2) With the intention of going to her place of work at the Pantai Medical Centre, Klang, Noor Suzaily, at 8 a.m. (on the same day) boarded the Permata Kiara bus WDE 4256 at the Klang Bus Stand, Kuala Lumpur. The accused was the driver of the bus. Upon boarding the bus, the accused issued her a ticket bearing serial number 10956 (P38D(2)). The ticket was produced from a ticket machine number 97450286 installed in the bus.

(3) In the morning of that fateful day, the accused drove his bus from the Klang Bus Stand, Kuala Lumpur, to Klang. At Klang, the accused, with the intention of committing the heinous crimes that he is now charged with, drove the bus to Jalan Pegaga at Taman Chi Liung and stopped there – where he was spotted by Devan (PW5); then he drove the bus to Jalan Sambau and stopped; and then he drove his bus to site of the Bukit Tinggi project and, again stopped – where he was spotted by PW8, PW9 and PW10. Throughout, his victim, Noor Suzaily, was in the bus. While the bus was at Jalan Pegaga, Jalan Sambau and at Bukit Tinggi, something horrendous happened to Noor Suzaily in the bus; she was brutally raped and murdered.

(4) The driver of the 'Kiara' bus that was seen by Devan (PW5) at Jalan Pegaga and Jalan Sambau in the morning of 7 October 2000 was in fact the accused. And I have no doubt whatsoever that the woman that Devan (PW5) saw in the bus that morning at Jalan Pegaga, who appeared to be frantic and was banging her hands on the glass panel of passenger door of the bus, was the deceased, Noor Suzaily. That morning, from inside the bus, she was desperately crying for help. She could not open the passenger door because only the driver, that is the accused, could open it; neither could she open the emergency door, because it was locked.

(5) I am convinced beyond reasonable doubt that the accused mercilessly and brutally raped and murdered the deceased, Noor Suzaily, in the bus WDE 4256 driven by him in the morning of 7 October 2000 at the time and place as stated in the charges, that is to say, between around 8.50 a.m. at Jalan Pegaga in Taman Chi Liung, Klang, and 9.15 in the morning at the site of the project at Bukit Tinggi, Klang. The accused murdered Noor Suzaily by strangling her neck with a piece of cloth and by forcefully hitting her head with, or banging her head to, a hard object.

(6) After having raped and murdered his victim, the accused threw out the deceased's clothing from the bus while the bus was stationary at a construction site at Bandar Bukit Tinggi.

(7) Having thrown out the clothing, the accused moved his bus some distance away from the spot where earlier he had thrown the deceased's clothing, so as to be out of sight of PW9 and PW10 and of anyone else, and with the intention of disposing off the body of his victim. He then, at a 'safe' place in the vicinity of the project site, removed the deceased's body from the bus and left it at the spot where the body was subsequently, in the afternoon of the same day (7 October 2000), discovered by witnesses Radzlin (PW2) and Mohamad Ali (PW3).

(8) Having murdered Noor Suzaily, the accused took from his victim her Motorola Star Tac hand phone (P39) and her pendant (P36). On the same day, the accused bought a travel charger and a Celcom 019 prepaid sim card from PW40's (Cik Leow's) shop in Klang. The accused took the pendant to his house, put it inside a powder bottle and hid the bottle behind a door.

(9) Having disposed off the body of Noor Suzaily at the project site, the accused drove off heading for his base at the Permata Kiara bus workshop at Bukit Raja. On his way to the Permata Kiara bus workshop, while passing along the dual carriage way road (Jalan Jambatan Kota) in front of the Majlis Perbandaran Klang, the accused threw out from his bus and into a drain near a road divider important personal documents belonging to Noor Suzaily, namely, a Bank Muamalat saving account book (P47), a Citibank Mastercard (P46), a Wadiah Maybank saving account book (P48), and the identity card (P46) of the deceased.

(10) While still on his way to the Permata Kiara workshop and while passing Lebuh Keluli, a dual carriage way in Bukit Raja situated near the office of Pos Malaysia, the accused threw out of the bus that he was driving the bag (P38A) which Noor Suzaily was carrying with her when she boarded the bus at the Klang Bus Stand, Kuala Lumpur.

[10] Having been satisfied that the prosecution had made out a *prima facie* case the learned trial judge called upon the accused to enter his defence. The three alternatives were explained to the accused and he elected to give evidence on oath. The summary of the evidence of the accused is as follows. The accused in his evidence did not deny that on the morning of 7 October 2000 he was the driver of the bus bearing registration number WDE 4256. He also did not deny that on that morning he was driving the bus from the Klang Bus Stand at Kuala Lumpur to Port Klang.

According to the accused, on that morning there were only two passengers in the bus, that is, a woman friend of his by the name of Sikin and another Malay woman. It was the evidence of the accused that the Malay woman got down in a hurried manner at a bus stand in front of a medical centre in Klang. When asked by the learned Deputy Public Prosecutor whether this Malay woman was the deceased, the accused replied:

> Tidak perasan.

The accused denied raping and murdering the deceased. According to him Sikin boarded the bus at the Klang Bus Stand, Kuala Lumpur. On arriving at Klang he invited Sikin for a drink at a restaurant at Taman Chi Liung but as there was no place at the restaurant to park his bus he, instead, took Sikin to Jalan Sambau where they had a conversation in the bus. The accused said that while on the way to the restaurant at Jalan Pegaga his bus almost knocked down PW5 who was riding a bicycle at that time. The accused said that while he was talking with Sikin on the bus at Jalan Sambau he saw four men heading towards his bus carrying sticks and iron rods. This forced him to drive away from there so as to save himself and Sikin. From Jalan Sambau he took Sikin to the site of the project at Bukit Tinggi and stopped his bus. He got down from his bus to urinate. While urinating, he was approached by PW9 and PW10 and he had a conversation with them. While he was conversing, Sikin who was in the bus called him and said that she had found a hand-phone in the bus.

[11] In commenting on the evidence led by the defence the learned trial judge said:

> I was of the view that the accused's story was a mere concoction and the so-called Sikin did not exist but was merely a figment of his imagination. If Sikin did really exist, that would be a material factor for the defence; and the existence of Sikin surely would have been told by the accused to his counsel, and his counsel would certainly have asked Chief Inspector Shaimah, Frederikus and Marselinus, when cross-examining them, about Sikin.
>
> Another reason why I was of the opinion that the story about Sikin was a mere fabrication was that the story about Sikin as told to the Court by the accused was rather incomplete. The accused failed to tell the Court as to what subsequently happened to Sikin after she was said to have found a hand-phone on the bus. Did the accused send her home? Or did the accused leave her at the project site at Bukit Tinggi? Or, did the accused take

her along with him to the workshop? Or, did the accused drop her at some place in Klang? The accused just left the story hanging.

The story that the bus, which the accused drove, almost knocked down Devan at Jalan Pegaga was also difficult to believe. For, if the story was indeed true, this matter too would have been raised by his counsel when cross-examining Devan.

Furthermore, the accused failed to explain how his semen was found in the vagina of the deceased; or how the pendant belonging to Noor Suzaily happened to be kept in a powder bottle in his house.

On the whole, the accused failed to raise a reasonable doubt. On the contrary, I was satisfied that the prosecution had succeeded in proving their case beyond reasonable doubt.

According, I found the accused guilty of both the charges and, accordingly, I convicted him of the same.

[12] Learned counsel for the appellant, in presenting his argument in the appeal before us, submitted on the following issues:

(i) The admissibility of exh. P38D(2)

(ii) The admissibility of exh. P17

(iii) The admissibility of exhs. P46, P47, P48, P64 and P65.

(iv) The identification of the deceased by PW5

(v) The use of the blood sample taken from the accused

(vi) Sufficiency of the evidence of the chemist on the DNA analysis

We shall now consider the validity of the arguments raised by learned counsel in his submission.

(a) The Admissibility Of exh. P38D(2)

[13] Learned counsel contended that exh. P38D(2) was admitted in evidence without complying with the requirements of s. 90A. In admitting the exhibit in evidence the learned trial judge said:

Encik Sreekant Pillai, the learned counsel, objected to the admissibility of P38D(2) on the grounds that since the ticket P38D(2) was produced by a computer, therefore it was not admissible unless it was proved by the tendering of a certificate pursuant to section 90A(2) of the Evidence Act 1950 which reads:

> (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

The learned counsel cited *Public Prosecutor v. Ong Cheng Heong* [1998] 6 MLJ 678. Encik Sreekant submitted that, by reason of the definition of 'computer', the ticket machines on the Permata Kiara buses were computers.

Encik Mohd Hanafiah bin Zakaria, the learned Deputy Public Prosecutor, agreed that the ticket machine installed on each of the Permata Kiara buses was a computer for the purpose of section 90A, but disagreed that a certificate pursuant to subsection (2) of section 90A was necessary in order for the ticket to be admissible. The learned DPP argued that invoking or relying on subsection (2) of section 90A was not mandatory but only an option open to the prosecution. The learned DPP contended that in order to tender P38D(2) as evidence it was sufficient for him to rely on section 90A(1) read with the definition of 'computer' as found in section 3 of the Evidence Act. Subsection (1) of section 90A reads:

> (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

Section 3 of the Evidence Act defines 'computer' as follows:

> "computer" means any device for recording, storing, processing, retrieving or producing any information or other matter or for performing any one or more of those functions by whatever name or description such device is called; ... (not relevant) ...

The learned DPP submitted that the evidence of PW25 showed that the ticket P38D(2) was produced by the ticket machine in the ordinary course of its business. In my opinion, even without such evidence, subsection (6) of the Evidence Act deems the ticket to be produced by the ticket machine in the course of its ordinary use. Subsection (6) provides:

> (6) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

I agree with the submission of the learned DPP. The decision of the Court of Appeal in *Gnanasegaran Pararajasingam v. Public Prosecutor* [1997] 4 CLJ 6 supports his view. Shaik Daud Ismail JCA delivering the decision of the Court of Appeal ruled:

> As stated earlier, s. 90A was added to the Evidence Act 1950 in 1993 in order to provide for admission of computer produced documents and statements as in this case. On our reading of this section, we find that under sub-s (1) the law allows the production of such computer generated documents or statements if there is evidence that they were produced firstly by a computer. Secondly, it is necessary also to prove that the computer is in the course of its ordinary use. In our view, there are two ways of proving this. One way is, it "may" be proved by the production of the certificate as required by sub-s (2). Thus sub-s (2) is permissive and not mandatory. This can also be seen in sub-s (4) which begins with the words "Where a certificate is given under sub-s (2) ..." These words show that a certificate is not required to be produced in every case. It is our view that once the prosecution adduces evidence through a bank officer that the document is produced by a computer it is not incumbent upon them to also produce a certificate under sub-s (2) as sub-s (6) provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

I was satisfied that the ticket machines installed on the buses were computers. There was the evidence of PW25 and PW35 to the effect that the ticket machines recorded and stored information and produced tickets, status reports, shift reports, TLO reports and audit reports. Thus they were devices for recording, storing, and

producing information (see the definition of 'computer'). And I was also satisfied that the ticket P38D(2) was produced by one of those ticket machines. Thus the ticket P38D(2) as well as the information printed on it were admissible as evidence.

[14] The learned trial judge has therefore dispensed with the need to tender in evidence the certificate required by s. 90A(2) as there was evidence to show that the ticket machine is a computer and that the ticket was produced in the ordinary course of business of the ticket machine. He said that the presumption in s. 90A(6) is sufficient to establish the latter element even in the absence of evidence from PW25 to show that the ticket was produced by the machine in the ordinary course of its business. He found support for the stand taken in the judgment of the Court of Appeal in *Gnanasegaran a/l Pararajasingam v. PP* [1997] 4 CLJ 6. Accordingly, he admitted exh. P38D(2) in evidence. What therefore requires deliberation is whether the matters to be proved under s. 90A are only those dealt with by the learned trial judge; thereby bringing into sharp focus the proper role of the certificate prescribed in s. 90A(2) and the presumptions attached to it under s. 90A(4).

[15] It is of monumental importance to render a proper interpretation to s. 90A as it is a specific provision dealing with the admissibility of documents produced by a computer with its prevailing effect as provided by s. 90C of the Evidence Act 1950 ("s. 90C"). Section 90A reads as follows:

> (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.
>
> (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.
>
> (3) (a) It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it.

(b) A certificate given under subsection (2) shall be admissible in evidence as *prima facie* proof of all matters stated in it without proof of signature of the person who gave the certificate.

(4) Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced.

(5) A document shall be deemed to have been produced by a computer whether it was produced by it directly or by means of any appropriate equipment, and whether or not there was any direct or indirect human intervention.

(6) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

(7) Notwithstanding anything contained in this section, a document produced by a computer, or a statement contained in such document, shall not be admissible in evidence in any criminal proceeding, where it is given in evidence by or on behalf of the person who is charged with an offence in such proceeding the person so charged with the offence being a person who was:

(a) responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used; or

(b) in any manner or to any extent involved, directly or indirectly, in the production of the document by the computer.

[16] In the case of *Gnanasegaran a/l Pararajasingam v. PP* [1997] 4 CLJ 6 learned counsel submitted that the computer produced document could only be admitted under s. 90A if the prosecution proved not only that it was produced by a computer but also that it was produced in the course of its ordinary use and that in order to do so it was incumbent upon the prosecution to produce a certificate signed by someone solely in charge of the computer which produced the printout as required by s. 90A(2). He further

A submitted that a failure to produce the certificate was fatal and would render the document inadmissible. Shaik Daud JCA in writing for the Court of Appeal did not agree with the submission of learned counsel. His Lordship proceeded to hold that a document produced by a computer is admissible under s. 90A(1) B if it was produced by a computer and that it was produced by the computer in the course of its ordinary use. With regard to the need to tender in evidence the certificate it was held that since s. 90A uses the word "may" a certificate need not be produced in every case. In commenting on the circumstances when the C certificate must be tendered in evidence Shaik Daud JCA said:

> It is our view that once the prosecution adduces evidence through a bank officer that the document is produced by a computer, it is not incumbent upon them to also produce a certificate under sub-s (2) as sub-s (6) provides that a document produced by a D computer shall be deemed to be produced by the computer in the course of its ordinary use. ... It would be superfluous to have a provision such as in sub-s (6) if in every case a certificate must be produced. It follows, therefore, that such a certificate need only be tendered if an officer like Zainal is not called to testify that the E statement is produced by a computer. Then the certificate becomes relevant to establish that the document is produced by a computer in the course of its ordinary use. It is our view that when such an officer is not called, the court cannot rely on the deeming provision of sub-s (6).

F **[17]** It is implicit in the judgment of Shaik Daud JCA that what is required to be proved in order to render a document admissible under s. 90A are only that it was produced by a computer and that it was produced by the computer in the course of its ordinary use. It was held that these matters could be proved by the G tendering of oral evidence to show that the document was produced by a computer thereby activating the presumption in s. 90A(6) to show that the document was produced by the computer in the ordinary course of its use or, alternatively, by the production of a certificate to establish the same presumed fact. In H other words s. 90A(6) has been construed only as an alternative mode of proof to the use of a certificate.

[18] A careful perusal of s. 90A(1) reveals that in order for a document produced by a computer to be admitted in evidence it I must have been produced by the computer in the course of its ordinary use. It is therefore a condition precedent to be established before such a document can be admitted in evidence under s. 90A(1). The manner of establishing this condition has

been prescribed. It can be proved by tendering in evidence a certificate as stipulated by s. 90A(2) read with s. 90A(3). Once the certificate is tendered in evidence the presumption contained in s. 90A(4) is activated to establish that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced. Section 90A(4) must therefore be given its full effect as it has a significant role to play in the interpretation and application of s. 90A. Ordinarily a certificate under s. 90A(2) must be tendered in evidence in order to rely on the provisions of s. 90A(3) and (4). However, the use of the words "may be proved" in s. 90A(2) indicates that the tendering of a certificate is not a mandatory requirement in all cases. In *PP v. Chia Leong Foo* [2000] 4 CLJ 649 a plethora of authorities was referred to in ruling that facts to be presumed can, instead, be proved by other admissible evidence which is available. Thus the use of the certificate can be substituted with oral evidence as demonstrated in *R v. Shepherd* [1993] 1 All ER 225 in dealing with a provision of law similar to s. 90A. Needless to say, such oral evidence must have the same effect as in the case of the use of a certificate. It follows that where oral evidence is adduced to establish the requirements of s. 90A(1) *in lieu* of the certificate the presumptions attached to it, in particular, the matters presumed under s. 90A(4) must also be proved by oral evidence. In commenting on the nature of the evidence required to discharge the burden in such an event Lord Griffiths said in *R v. Shepherd* [1993] 1 All ER 225 at p 231:

> The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly.

It must be added that the condition precedent in s. 90A(1) coupled with the stipulation on the manner of its proof makes it clear in unmistakable terms that a document made admissible by the section is only one that was produced by a computer in the ordinary course of its use; and inapplicable to one that was not so produced.

[19] The resultant matter for consideration is the proper meaning to be ascribed to the deeming provision in s. 90A(6) in order to determine whether it can be a substitute for the certificate. A deeming provision is a legal fiction and is used to create an artificial construction of a word or phrase in a statute that would not otherwise prevail. As Viscount Dunedin said in *CIT Bombay v. Bombay Corporation* AIR [1930] PC 54 at p 56:

> Now when a person is 'deemed to be' something the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were.

In commenting on the words "deemed to be" *The Law Lexicon* 7th Reprint Edition by Ramanatha Aiyar says at p 302:

> No doubt the phrase 'deemed to be' is commonly used in statutes to extend the application of a provision of law to a class not otherwise amenable to it.

Its primary function is to bring in something which would otherwise be excluded (see *Malaysia Building Society Bhd v. Lim Kheng Kim & Ors* [1988] 1 CLJ 675; [1988] 1 CLJ (Rep) 770). In *Ex parte Walton, In re Levy* [1881] 17 Ch D 746 it was held that in interpreting a provision creating a legal fiction the court is to ascertain for what purpose the fiction is created, and after ascertaining this, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect of the fiction. It would be proper and even necessary to assume all those facts on which alone the fiction can operate (see *Shital Rai v. State of Bihar* AIR [1991] Pat 110 (FB)). In so construing a fiction it is not to be extended beyond the purpose for which it is created (see *In re Coal Economising Gas Company* [1875] 1 Ch D 182) or beyond the language of the section by which it is created (see *CIT Bombay City II v. Shakuntala* AIR [1966] SC 719). The fiction in the realm of law has a defined role to play and it cannot be stretched to a point where it loses the very purpose for which it is invented and employed (see *Bindra's Interpretation of Statutes*, 9th edn p 72). It is required by its very nature to be construed strictly and only for the purpose for which it was created; and its application cannot be extended (see *FCT v. Comber* [1986] 64 ALR 451). Thus it cannot be pushed so far as to result in a most anomalous or absurd position (see *Ashok Ambu Parmar v. Commr of Police, Badodara City AIR* [1987] Guj 147).

[20] It must be remembered that the purpose of tendering in evidence a certificate under s. 90A(2) is to establish that a document was produced by a computer in the ordinary course of its use. On the other hand s. 90A(6) deems a document produced by a computer to have been produced by the computer in the course of its ordinary use. They are incompatible and inconsistent with each other. A fact cannot be deemed to have been proved when specific provision has been made for the mode of proof of the same fact. If therefore s. 90A(6) is to function as a substitute for the certificate it will render nugatory s. 90A(2). This will not accord with the basic rules of statutory construction. It is perhaps pertinent to bear in mind *Madanlal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd* AIR [1962] 1543 where Gajendragadkar J said at p 1551:

> In construing section 76(1) and (2), it would be necessary to bear in mind the relevant rules of construction. The first rule of construction which is elementary, is that the words used in the section must be given their plain grammatical meaning. Since we are dealing with two sub-sections of s. 76, it is necessary that the said two sub-sections must be construed as a whole 'each portion throwing light, if need be, on the rest'. The two sub-sections must be read as parts of an integral whole and as being inter-dependent; an attempt should be made in construing them to reconcile them if it is reasonably possible to do so, and to avoid repugnancy. If repugnancy cannot possibly be avoided, then a question may arise as to which of the two should prevail. But that question can arise only if repugnancy cannot be avoided.

Every effort must thus be made to reconcile both the sub-sections in order to avoid a conflict between them.

[21] Such a reconciliation exercise will be greatly facilitated by a consideration of the object of s. 90A(6). Section 90A(1) provides for the admissibility of a document produced by a computer in any criminal or civil proceeding. Such a document is in fact a reference to a document whether or not it was produced by a computer after the commencement of any criminal or civil proceeding. Accordingly, the applicability of s. 90A(6) to documents produced by a computer "... whether or not ..." they were produced after the commencement of any criminal or civil proceeding etc, will strike at the very foundation of s. 90A(1) as those documents constitute the very basis of the section. It will result in s. 90A(1) being rendered otiose. Such documents cannot therefore be within the contemplation of s. 90A(6). So s. 90A(6) must have some

other purpose to serve. Its true scope and meaning will become clear if it is read in the light of s. 90C. It provides that the provisions of ss. 90A and 90B shall prevail over any other provision of the Evidence Act 1950 thereby making s. 90A the only law under which all documents produced by a computer are to be admitted in evidence. There may be instances when a document which is sought to be admitted in evidence may not have been produced by a computer in the course of its ordinary use even though it is one that is contemplated by s. 90A(1). The document, even though produced by the computer, may not have anything to do with the ordinary use of the computer. It may, for example, be a letter produced by the computer which has no bearing on the ordinary use of the computer. Yet it is still a document produced by a computer. How is this document to be admitted in evidence bearing in mind the prevailing effect of s. 90C in making all documents produced by a computer admissible only under s. 90A if the condition precedent to its admissibility under s. 90A(1) cannot be fulfilled by virtue of it not having been produced by the computer in the course of its ordinary use? It is this question that is answered by s. 90A(6). The sub-section does not contain the condition precedent and, instead, contains a deeming provision to the same effect. As its purpose is to render a document produced by a computer to be one that is produced by the computer in the ordinary course of its use it can only apply to a document which is not produced by the computer in the ordinary course of use. It is incongruous to deem a document to have been produced by a computer in the ordinary course of its use when it is such a document already. This will become clear if it is recalled that the object of a deeming provision is to create an artificial status for something when in reality it is not. As stated earlier the function of a fiction is to extend the application of a provision of law to a class not otherwise amenable to it. Thus s. 90A(6) can only apply to a document which was not produced by a computer in the ordinary course of its use, or, in other words, to a document which does not come within the scope of s. 90A(1). Thus it cannot apply to a document which is already one that is produced by a computer in the ordinary course of its use. It cannot therefore be used as a mode of proof to establish that such a document was so produced. The document must be proved in the manner authorised by s. 90A(2). It can now be discerned with ease that s. 90A(6) has its own purpose to serve and can never be a substitute for the certificate.

[22] In the case of s. 90A(6) once its deeming part becomes applicable to a document which was not produced by a computer in the ordinary course of its use the condition precedent in s. 90A(1) would have been satisfied in order to render it admissible. However, the requirements of s. 90A(4) must still be established. This can be done by tendering in evidence the certificate under s. 90A(2) or by way of oral evidence. It must be stressed that s. 90A only deals with the admissibility of a document produced by a computer and not to the weight to be attached to it which will be the subject matter of a separate exercise.

[23] It follows that the learned trial judge was correct in holding that exh. P38D(2) may be proved by oral evidence. But he has failed to appreciate the matters that require to be proved in following that course. The only findings he made were that exh. P38D(2) was produced by a computer and that it was produced by the computer in the course of its ordinary use. He has not considered the matters that must be proved as required by s. 90A(4) in the absence of a certificate having been tendered for such matters to be presumed. They are that:

(a) the computer was in good working order, and

(b) it was operating properly in all respects throughout the material part of the period during which the document was produced.

[24] It now becomes necessary to consider whether there is evidence to establish these requirements. As stated earlier it is sufficient if such evidence satisfies the guidelines enunciated in *R v. Shepherd* [1993] 1 All ER 225. With regard to proof of the working condition of the ticket machine PW25 said:

> Setiap pagi, apabila pemandu datang untuk bertugas, mula-mula pemandu itu kena check air dan minyak hitam bas yang dia akan pandu. Habis itu dia start engine. Pemandu akan keluarkan satu resit dari mesin yang akan keluarkan resit.

And in a later part of his evidence he said:

> Mesin ini bukan khas untuk bas berkenaan. Kalau rosak, kita akan gantikan dengan mesin yang lain yang akan keluarkan nombor mesin yang lain. Selagi tidak rosak mesin itu tidak akan ditukar dan tiap-tiap bas ada mesin yang sama.

PW25 also said that at about 9.30am the accused returned the bus to the office as it needed repairs. He then said in answer to questons:

> Q: Pada 7.10.2000 selain dari mengadu longshaft rosak, ada tertuduh mengadu apa-apa lain kerosakan?
>
> A: Tidak ada. Longshaft sahaja.
>
> Q: Ada dia mengadu tentang kerosakan mesin tiket?
>
> A: Tidak ada.

In his evidence PW37 said:

> Q: Selain kerosakan kepada longshaft, ada terdapat kerosakan lain?
>
> A: Tak ada.

This evidence is sufficient to show that the ticket machine was in good working condition. With regard to proof of the second requirement PW25 also said that two tickets bearing numbers 10956 and 10957 had been sold from the machine in the bus driven by the accused in its journey from Kuala Lumpur to Port Klang. In this regard he said:

> Ticket No 10956 was the first ticket to be issued for the particular journey. Ticket No 10957 was the second as well as the last ticket to be issued for that journey.

The issue of the tickets by the machine shows that it was operating properly in all respects at all material times. With proof of these two elements whatever is presumed to exist pursuant to s. 90A(4) has been proved by way of oral evidence. Exhibit P38D(2) is therefore admissible though not on the grounds advocated by the learned trial judge.

(b) The Admissibility Of exh. P17

[25] Exhibit P17 is a summary of the DNA profiling result prepared by PW11. The defence contended that as this exhibit is a computer printout there must be compliance with s. 90A before it can be admitted in evidence. It was argued that as there is no such compliance its admissibility is wrong in law.

[26] It must be observed that exh. P17, a document produced by a computer, is a record of information processed and produced by DNA analysers and a thermalcycler. These are also computers within the meaning of the definition of "computer" in s. 3 of the Evidence Act 1950 ("s. 3"). Exhibit P17 therefore involves more than one computer in its production. This raises the question of whether all the computers involved or only one of them and, if so, which one, must be proved for the purposes of s. 90A. Pursuant to s. 3 where two or more computers carry out the function of recording, storing, processing, retrieving or producing any information, as in this case, "... in combination or in succession or otherwise howsoever conjointly, they shall be treated as a single computer". Accordingly, all the computers involved in the DNA analysis by PW11 must be treated as one computer. What requires consideration is whether the computer to be proved for the purposes of s. 90A is exh. P17, which merely recorded the information, or the computers that processed and produced the information. The answer would depend on whether the prosecution is seeking to prove the mere recording of the information or the manner in which it was processed in order to obtain the result. It is the latter evidence that is required by the prosecution in order to prove its case. In other words what is relevant for the prosecution is not the document produced by the computer (exh. P17) but the statements contained in it. There is a distinction between them. This is recognised by s. 90A itself which provides for the admissibility of "... a document produced by a computer, or a statement contained in such document ...". Thus what requires to be established in order to comply with s. 90A is the condition of the computers that produced the results as contained in exh. P17 and not the computer itself which produced exh. P17.

[27] It is clear by now that in order to comply with the requirements of s. 90A the tendering in evidence of a certificate prescribed in s. 90A(2) will ordinarily render a document produced by a computer in the course of its ordinary use admissible in evidence. In this case no certificate was tendered in evidence with regard to the admissibility of the statements in exh. P17. Oral evidence is therefore required to establish the condition precedent in s. 90A(1) in order to show that the statements in exh. P17 were produced by computers in the ordinary course of their use. The oral evidence of PW11 is sufficient to establish this issue. In the absence of a certificate having been tendered in evidence under s. 90A(2) this is sufficient to establish the condition

precedent contained in s. 90A(1). However there must be further oral evidence in lieu of the presumptions attached to a certificate. In particular the matters enumerated in s. 90A(4) must be proved. They are that:

(a) the computer was in good working order, and

(b) it was operating properly in all respects throughout the material part of the period during which the document was produced

The prosecution did not lead any evidence in proof of these matters. However, the cross-examination of PW11 by the defence has brought on record the required evidence. The material parts of his cross-examination read as follows:

Q: How many DNA analysers are there in your lab?

A: At present we have two.

Q: These machines are computerised machines?

A: The machines are computer operated, but the samples have to be loaded manually.

Q: These machines are used by all the 8 chemists in the lab?

A: Yes.

Q: Are the PCR analysis on the samples done on the same machine, or is there another machine?

A: The PCR is done on a separate machine called a thermalcycler which is kept in a separate room, and therefore it is done separately.

Q: How many thermalcycler does the lab have?

A: Three.

Q: All 8 chemists have access to these machines?

A: Yes.

Q: Do the lab assistants have access to both these machines ie, the DNA analyser and the thermalcycler?

A: No.

Q: The thermalcycler is also a computerised machine?

A: Yes.

Q: How often are the DNA analyser and the thermalcycler calibrated?

A: Once every 6 months.

Q: They are calibrated by whom?

A: They are calibrated by the service engineers from the company that supply these equipments.

Q: Do you know the company?

A: Applied Biosystems (M) Sdn Bhd.

... ...

Q: To avoid errors in your testing the PCR method, did you do repetitive analysis on the samples?

A: Yes.

... ...

Q: Do you have the records on the calibration of the equipments?

A: Yes, it is in the office.

Q: Is it the requirement that they should be calibrated every 6 months; or are they calibrated according to the amount of usage?

A: These machines, each time when we start them, it goes through a self-test to ensure that all the programmes and the equipment is running at optimum. If anything fails during the process, it will be highlighted. This six-monthly checks by the service engineer, is a service contract which the Department has with the company supplying the equipment. There are 2 types of servicing every 6 months, or once a year.

Q: So the calibration is based on the service contract and not based on any departmental requirement.

A: To qualify for any proficiency test, we have to meet certain criteria and one of each is the calibration of machines. So we choose to do it six-monthly instead of manually.

Q: Can you bring the service records for:

(1) The DNA analyser; and

(2) The thermalcycler to the court this afternoon?

A: Yes.

... ...

Q: Are keying in of data required before the test is run on either of the equipments ie, the DNA analyser and the thermalcycler?

A: We have got more data to key in for the DNA analyser, as compared to the thermalcycler.

Q: If wrong data are keyed in into the DNA analyser or the thermalcycler it would bring about the wrong result?

A: Yes, and again that is why we run repeats.

Q: If the machines are not calibrated by the service enginner, would the self testing be affected as well?

A: Yes, furthermore, the final results will also show inconsistencies.

In his re-examination he said:

Q: Are the two equipment issued with any certification on the calibration?

A: The thermalcycler came with a certificate, but not the DNA analyser.

Q: When was that?

A: The certificate was issued on 13 February 1997.

Q: This certification was obtained from whom.

A: The maker of the equipment, that is, Perkin Elmer USA.

Q: By this certification, what does it mean.

A: It means that the machines has been tested and performed successfully in accordance with the requirements specified in the Perkin Elmer assembly and test specification; and that they are calibrated against, certified equipment according to the National Institute of Standards and Technology, USA.

D34A is the maintenance record for the thermalcycler and is dated 25 October 2000. This is the date that this maintenance report was made. The actual work of maintenance and servicing probably would take about 1 to 1½ days before this stated date. The summary says that the instrument was checked, calibrated and found to be in the best workable condition and ready to perform its required function.

D34B is the report of the maintenance on the DNA analyser. Date is dated 29 November 2000. And it states:

> Verified normal plate check to ensure that all connections are good, instruments communicate with computer, temperature senses are working and scan lines look good.

The evidence shows that the DNA analyser and the thermalcycler are calibrated once every six months. Exhibits D34A and D34B are the maintenance records for the thermalcycler and the DNA analyser. They state that the machines are in good working order. This is sufficient to show that the computers were in good working order. In order to establish that the computers were operating properly in all respects throughout the material part of the period during which the document was produced there is evidence to show that to avoid errors in the PCR method of testing repetitive analysis on the samples is done. There is also evidence to show that each time the machines are started they go through a self-test to ensure that all the programmes and the equipments are running at their optimum level. This evidence is sufficient to prove the requirements of s. 90A(4) in the absence of a certificate having been tendered.

[28] It follows that exh. P17 was correctly admitted in evidence.

(c) The Admissibility Of exhs. P46, P47, P48, P64 And P65

[29] These exhibits were recovered by the police as a result of information supplied by the accused in the course of giving his cautioned statement. The learned trial judge had found the statement to be involuntary and had ruled it as being inadmissible. However, he had admitted the exhibits in evidence. Learned counsel contended that the exhibits should be excluded as their recovery under s. 27 of the Evidence Act 1950 ("s. 27") is based on an inadmissible cautioned statement.

[30] The objection raised brings into focus the question of the applicability of the voluntariness rule to s. 27 and the admissibility of information relating to facts discovered in consequence of a statement rendered inadmissible as being involuntary. This question has been answered by the Federal Court in *Francis Antonysamy v. PP* [2005] 2 CLJ 481:

> The object of the voluntariness rule in s. 24 is therefore to preserve the privilege. The resultant critical issue for determination is whether this privilege also extends to s. 27. If this privilege is to be read as a part of s. 27 the information supplied under the section must, in the first place, be also subject to the voluntariness rule in s. 24. If it is not so subjected s. 27 will not be governed by the privilege. It has been established by a long line of authorities that s. 27 is independent and is not subject to the voluntariness rule in s. 24. See, for example, *Lee Kok Eng v.*

Public Prosecutor [1976] 1 MLJ 125; *Chong Soon Koy v. Public Prosecutor* [1977] 2 MLJ 78; *Chandrasekaran & Ors v. Public Prosecutor* [1971] 1 MLJ 153 and *Wai Chan Leong v. Public Prosecutor* [1989] 3 MLJ 356. Then came *Md Desa bin Hashim v. Public Prosecutor* [1995] 3 MLJ 350 where it was ruled that in order for information supplied under s. 27 to be admissible it must be voluntary. The law was re-instated to its rightful position in *Goi Ching Ang v. Public Prosecutor* [1999] 1 MLJ 507. In our opinion it is illogical to suggest that s. 27 is subject to the voluntariness rule in s. 24. If that were to be so the desired evidence can be admitted under s. 24 without there being any need for s. 27. The fact that s. 27 has been specifically enacted is therefore a clear indication that it has a purpose of its own to serve. As it applies only to a restricted and specified type of evidence as opposed to s. 24 it can only mean that it is an independent provision which is unaffected by s. 24, or, for that matter, any other statutory provision regulating the manner of taking or recording statements from any person. This is illustrated by the established rule that information relating to facts discovered in consequence of a confession rendered inadmissible by reason of being involuntary is still admissible under s. 27 (see *R v. Warickshall* [1783] 1 Leach 263; *R v. Lockhart* [1785] 1 Leach 386). Thus the existence of s 27 on its own without being affected by s. 24, s. 113 and s. 37A of the Dangerous Drugs Act 1952 was correctly recognised by this court in *Wai Chan Leong v. Public Prosecutor* [1989] 3 MLJ 356. That would also be the inevitable result of the relationship between s. 112 and s. 27. The corollary is that s. 27 is not subject to the voluntariness rule or any other prescribed mode or recording statements. Even the passage from *Goi Ching Ang v. Public Prosecutor* [1999] 1 MLJ 507 referred to by learned counsel does not support the stand taken by him. This court referred to s. 112 in that case not as a condition of admissibility of information under s. 27 but as a ground for excluding such evidence in the exercise of the discretion of the court. Both are different concepts. Since voluntariness is not a condition of admissibility of information supplied under s. 27 the privilege against self-incrimination which is manifested in an involuntary statement or in a statement made in breach of the requirements of s. 112 must be deemed to have been impliedly abrogated insofar as s. 27 is concerned. It follows that the argument of learned counsel that s. 27 is subject to the voluntariness rule in s. 24 and the privilege against self-incrimination in s. 112 cannot be sustained.

It is therefore clear that the voluntariness rule does not apply to s. 27. Thus information relating to facts discovered in consequence of a confession rendered inadmissible by reason of being involuntary is still admissible under s. 27. It follows that exhs. P46, P47, P48, P64 and P65 were correctly admitted in evidence.

[31] The rejection of the cautioned statement of the accused by the learned trial judge raises a question of procedure of importance. He had made his ruling on the admissibility of the cautioned statement after the prosecution had closed its case in the trial within a trial on the ground that no *prime facie* case had been made out. As he said in making the ruling:

> (1) Soal yang penting di peringkat ini ialah Mahkamah menentukan samada Mahkamah berpuashati bahawa, secara *prima facie*, pengakuan Tertuduh diberi dengan sukarela.
>
> Setelah menimbangkan hal keadaan (circumstances) dalam mana pengakuan itu dibuat, Mahkamah tidak berpuashati bahawa, secara *prima facie*, pengakuan itu dibuat secara sukarela.
>
> Saya telah menimbangkan factor-faktor berikut. Mengikut keterangan, Tertuduh ditangkap pada jam lebih kurang 2.45 petang. Sessi soalsiasat bermula pada jam lebih kurang 5.30 petang. Soalsiasat berterusan hinggalah sampai ke suatu ketika pada 8.10 malam apabila Tertuduh memberitahu ASP Sapii yang dia ingin memberitahu sesuatu kepada beliau. Dari masa mulanya sessi soalsiasat pada 5.30 petang sehinggalah 8.10 malam apabila Tertuduh memberitahu ASP Sapii yang dia ingin memberitahu sesuatu, kesemuanya ini memakan masa selama 2 jam 40 minit. Tapi, jikalau diambil kira dari masa Tertuduh mula-mula ditangkap di Pelabuhan Klang pada jam lebih kurang 2.45 petang sehingga masa Tertuduh memberitahu ASP Sapii yang dia ingin memberitahu sesuatu, kesemuanya ini memakan masa selama 5½ jam. Dari masa Tertuduh mula ditangkap sehingga Tertuduh memberitahu yang dia ingin memberitahu sesuatu, Tertuduh tidak diberi rihat, makan atau minum. Dan semasa sessi soalsiasat Tertuduh diapit di kiri kanan oleh D/Kpl Darshan Singh dan D/Kpl Hashim. Kalau diambilkira kesemua factor ini saya berasa sukar untuk menyakinkan diri saya bahawa terdapat kes *prima facie* bahawa pengakuan itu benar-benar diberi secara sukarela.
>
> Dalam kes ini apa yang sepatutnya dilakukan oleh ASP Sapii apabila Tertuduh memberitahunya yang dia ingin menyatakan sesuatu, ialah, untuk beliau mengaturkan supaya Tertuduh dihantar kepada seorang pegawai polis yang lain yang tidak terlibat dengan soalsiasat atau penyiasatan supaya satu percakapan beramaran di

A bawah s. 113 boleh diambil. Dan percakapan ini hendaklah dilakukan pada masa dan waktu yang lain, di mana Tertuduh akan berada di dalam keadaan yang lebih tenang dan selesa.

Oleh itu percakapan Tertuduh adalah tidak diterima sebagai keterangan.

B

In *Public Prosecutor v. Kalaiselvan* [2001] 2 MLJ 157 the High Court considered the proper stage of the trial within a trial at which a ruling on voluntariness can be made. As stated at pp. 166-167:

C

Be that as it may, a trial within a trial cannot be equated with an ordinary criminal trial for all purposes from a procedural point of view. There is at least one vital difference between both the proceedings. It relates to the right of an accused to make a submission of no case at the end of the case for the prosecution. D In an ordinary criminal trial the prosecution must make out a *prima facie* case at the end of its case failing which the accused is entitled to an acquittal. This gives him a right to make a submission of no case to answer. In the light of the subjective consideration underlying the test of voluntariness in a trial within a trial, the accused must discharge the evidential burden of E establishing the allegations raised by him. He must show that the inducement, threat or promise complained of affected his mind in causing him to make the statement (see *PP v. Teh Lye Tong* [1958] 3 MC 208; *PP v. Law Say Seck & Ors* [1971] 1 MLJ 199; *Aziz bin Muhamad Din v. PP* [1996] 5 MLJ 473). Thus, as stated by F the Privy Council in *Wong Kam-ming v. The Queen* [1979] 1 All ER 705, the accused can almost never make an effective challenge to the admissibility of the statement without giving evidence himself. He is therefore virtually compelled to give evidence (see *R v. Brophy* [1981] 2 All ER 705). It is only when he has G discharged his evidential burden that it becomes the function of the court to determine the issue of voluntariness (see *Aziz bin Muhamad Din v. PP* [1996] 5 MLJ 473). The court must therefore hear the accused before making a ruling on voluntariness. This means that the question of the prosecution making out a *prima facie* case in a trial within a trial does not H arise before the accused is called upon to testify. This will preclude the making of a submission of no case to answer at the end of the prosecution case as in an ordinary trial. As an illustration I refer to a trial within a trial where the evidence adduced by the prosecution shows that some threat was used on the accused. No ruling can be made on the effect of this evidence I at the end of the case for the prosecution. Its real value will only emerge when the accused testifies to explain that the threat 'caused' him to make the cautioned statement. As I explained

earlier, it is only then that the court can make a ruling. However, a submission of no case to answer can be made if it is based on grounds which do not require the testimony of the accused. It can be made on a point of law, as for example, when the required caution has not been administered in accordance with law or when the evidence adduced is insufficient in law. Evidence would be insufficient in law when the prosecution has failed to call some material witnesses. In these instances, a ruling can be made based merely on the evidence adduced by the prosecution, and it would be an exercise in futility to carry on with the trial within a trial to its conclusion as, the result would be the same even if the accused were to testify. If, however, a point of law raised is not successful there ought to be no prohibition on the accused giving evidence on the facts as the facts would not and could not have been the basis of the submission. Any curtailment of the right of the accused to call evidence if the submission fails will amount to a denial of justice as the accused will be prevented from discharging the evidential burden on him. This is particularly significant in view of the subjective consideration involved in making a ruling which requires the evidence of the accused to be taken into account. I am therefore of the view that the accused has the right to make a submission of no case to answer on points of law at the close of the case for the prosecution, and, if the submission fails he has the right to give evidence and call witnesses.

It follows that the cautioned statement of the accused had been improperly excluded by the learned trial judge. However, the matter was not raised by the prosecution before us.

(d) The Identification Of The Deceased By PW5

[32] Learned counsel objected to the sufficiency of the evidence in relation to the identification of the deceased by PW5. It was argued that he saw what happened in the bus for only about 10 seconds; he was about 23 feet away at that time; the glass panels of the bus were tinted; and the deceased's hair was all over her. It was contended that in the circumstances the identification of the photograph of the deceased in the newspapers by PW5 as the person whom he saw in the bus offended the Turnbull guidelines and should therefore be rejected.

[33] The relevant part of the evidence of PW5 is as follows:

A Saya ternampak seorang wanita sedang mengetuk cermin pintu bas itu. Cermin pintu di bahagian tangga untuk penumpang turun-naik. Rambutnya berselerak dan dia tidak berpakaian di bahagian atas. Pada masa yang sama, pemandu bas itu mengarahkan saya supaya pergi dengan tangan seolah-olah tidak ada apa-apa yang berlaku.

B …

Pada masa yang sama, saya ternampak sebuah motosikal yang melalui kawasan itu. Dan saya cuba mendapatkan perhatiannya, untuk meminta pertolongan. Pada masa yang sama, bas tersebut mula bergerak menjauhi saya. Apabila penunggang motosikal itu C menghampiri saya, saya cuba menjelaskan apa yang berlaku. Saya berada di atas basikal saya dan penunggang motosikal itu yang berada di motosikalnya mengejar bas tersebut. Pada masa itu saya juga melihat nombor plet kenderaan itu. Kami mengejar bas itu sehingga sampai ke bulatan Taman Chi Liung. Bas itu bergerak D menuju ke Jalan Sambau, kemudian saya meminta pertolongan dari sebuah rumah berdekatan dengan bulatan Taman Chi Liung itu. Saya memberitahu apa yang berlaku sebenarnya kepada seorang lelaki yang berusia dalam lingkungan lima puluhan tahun itu dan meminta untuk menggunakan telefonnya untuk menghubungi pihak polis, tetapi dia dan penunggang motosikal itu menuju ke arah bas E itu. Penunggang motosikal itu seorang lelaki Cina. Kami bertiga menuju ke arah bas itu dan kami juga meminta pertolongan daripada seorang driving instructor. Kemudian kami berempat menuju ke arah bas itu. Dalam menuju bas itu, saya mengambil sebatang kayu dan menuju ke arah bas itu. Apabila sampai di F pintu penumpang (pintu turun-naik) bas itu, saya ternampak pemandu bas itu menuju ke arah tempat pemandu, sambil menaikkan seluarnya. Apabila melihat kami berempat, pemandu bas itu cuba melarikan diri dengan bas itu. Pemandu bas itu telah meninggalkan kawasan itu. Sebelum pemandu bas itu keluar dari kawasan itu, dia memarahi kami dan menghulurkan jari. G Kemudian pemandu bas itu menuju ke arah bulatan Taman Chi Liung dan saya tidak pasti ke arah mana bas itu menghala.

Selepas itu saya ke pusat tuisyen saya. Setibanya saya di pusat tuisyen saya, saya mencatitkan nombor tersebut di atas buku kerja H saya. Jarak masa di antara saya di Jalan Sambau dan saya mencatit nombor itu adalah lebih kurang 2-3 minit. Buku kerja di mana saya catit ialah buku kerja soalan peperiksaan tahun yang lepas mata pelajaran fizik. (Buku fizik dirujuk kepada saksi dan di tanda P6.) (Saksi tunjuk di mana catitan dibuat (di ms 3).) (Ms 3 buku ditanda P6A.) Nombor catitan yang saya buat ialah 'WDE I 4256 KIARA'. Catitan ini adalah nombor bas tersebut yang saya lihat di kedua-dua tempat tersebut, iaitu, di Lorong Pegaga dan di Jalan Sambau. Saya tulis 'KIARA' kerana bas tersebut adalah bas ekspress KIARA.

Four days later PW5 read about the incident in the newspapers. As he said in answer to questions: A

Q: Bagaimana kamu boleh kaitkan berita dalam akhbar itu dengan kejadian yang kamu lihat itu?

A: Pertama, bas itu adalah bas KIARA. Dan wanita yang meninggal dunia itu adalah wanita yang pernah saya lihat di dalam bas KIARA tersebut. Dalam akhbar itu ada disiarkan gambar wanita yang saya lihat itu. Akhbar yang saya baca itu adalah 'The Star'. B

(Akhbar 'The Star' bertarikh 12hb Oktober 2000, Khamis, dirujuk kepada saksi – ditanda ID7. Yang dirujuk ialah m.s. hadapan dan m.s. 3.) C

Inilah laporan akhbar yang saya baca. Gambar wanita yang saya lihat ialah gambar wanita di muka hadapan (saksi rujuk kepada gambar muka wanita Melayu bernama Noor Suzaily dalam pakaian graduation (graduation attire)). D

Sebelum perkara ini tersiar di dalam akhbar saya ada beritahu ayah dan ibu saya tentang kejadian itu. Saya beritahu mereka pada hari yang sama – 7hb Oktober 2000. Apabila saya beritahu mereka, mereka terkejut. Mereka tidak suruh saya untuk membuat laporan polis. E

Saya tidak buat laporan polis kerana saya tidak sangka yang wanita ini akan dibunuh. Pada masa itu saya sangka perempuan itu akan dilepaskan. F

Selepas terkeluar berita dalam akhbar, barulah saya dan ayah saya membuat laporan. Saya dan ayah saya pergi ke balai polis dan kami memberi keterangan kepada pihak polis. Polis mengambil statement daripada saya. Hanya saya. Saya beritahu polis apa yang saya lihat pada 7 Oktober. G

Saya buat rajah kasar sebelum saya pergi ke balai. Saya buat rajah kasar ini di rumah saya. Pertama, saya hanya gunakan pensel untuk buat rajah kasar. Kemudian saya gunakan komputer. Saya membuat lakaran di kertas, dan ayah saya membantu saya untuk membuat lakaran tersebut di dalam komputer. Lakaran komputer ini, kemudiannya, saya serahkan kepada pihak polis. Saya tidak menyimpan lakaran yang saya lukis dengan pensel. Saya membuangnya. Saya tidak serahkan lakaran komputer itu kepada C/Insp Shaimah. Mungkin kepada seorang pegawai polis India bernama Mano. (Lakaran komputer dirujuk kepada saksi.) H I

Inilah lakaran yang dilukis oleh bapa saya dengan menggunakan komputer (ditanda ID8).

(ID8 dirujuk kepada saksi). Rumah saya di Bayu Perdana, seperti dinyatakan dalam rajah kasar ini. Tempat tuisyen saya ialah melalui jalan yang menghala ke Lebuh Turi. Bagi saya tempat tuisyen saya masih lagi dalam Taman Chi Liung. Saya naik basikal melalui Jalan Pegaga. Apabila sampai di T junction, di mana Jalan Pegaga bertemu dengan Lorong Pegaga, saya belok ke kiri ke Lorong Pegaga. Saya menunggang basikal di sebelah kanan lorong tersebut, bermaksud di sebelah kanan jalan jika kita menghala ke Persiaran Pegaga. Bas itu berhenti di tempat yang ditanda 'I'. Bas ada di lakaran. Bahagian lightly shaded adalah bahagian depan bas. Bahagian yang gelap ialah bahagian badan bas. Apabila saya masuk ke Lorong Pegaga, saya memberhentikan basikal saya (saksi tanda dengan huruf 'D' di mana dia berhenti). (Saksi tandakan laluan yang dia gunakan dengan tanda 'broken lines'.)

Pertama kali saya lihat bas itu ialah semasa saya berada di simpang T junction itu. Pada masa itu bas itu sedang hendak berhenti. Pada masa itu saya nampak bahagian depan bas itu. Semasa saya di simpang itu, saya lihat wanita itu berada di bahagian depan bas, di 'aisle', iaitu, di tempat laluan, dan pemandu bas itu berada di tempat pemandu. Semasa saya mula lihat wanita itu, saya tidak pasti keadaannya. Saya dalam perjalanan ketika itu dan saya tidak dapat melihatnya dengan betul. Saya tidak tahu tentang pakaian pemandu pada ketika itu. Dia berada di tempat pemandu. Saya tidak pasti sama ada pemandu berpakaian atau tidak.

Dari T junction ini, saya menyeberangi jalan Lorong Pegaga.

Semasa saya melihat wanita itu mengetuk cermin pintu tangga, saya berada di D. Pada masa itu, saya boleh lihat wanita itu dengan jelas. Saya dapat lihat sebahagian sahaja tubuh wanita itu. Saya lihat bahagian atas dada. Tubuh wanita itu terdedah. Maksud saya dia tidak berpakaian dari bahagian dada ke atas.

Semasa saya di D, jarak di antara saya dengan bas itu adalah lebih kurang 10 kaki. Tempat di mana bas itu terletak adalah terang. Kejadian berlaku pada siang hari. Wanita itu berada sangat dekat dengan pintu tangga. Dia berada di bahagian dalam bas. Pada masa itu, pintu bas itu tertutup. Dia sedang mengetuk cermin pintu semasa saya melihatnya. Dia menggunakan kedua-dua belah tangannya. Saya tidak mendengar apa-apa semasa wanita itu sedang mengetuk cermin pintu itu. Saya nampak mulutnya bergerak tapi saya tidak dapat dengar apa yang dia katakan. Selain daripada itu, saya tidak buat apa-apa yang lain.

Saya dapat lihat muka wanita itu. Pada masa itu rambutnya berselerak dan dia melambaikan kedua-dua tangannya dalam keadaan cemas. Pada tanggapan saya, dia cuba meminta pertolongan.

...

Setuju bahawa cermin bas ini adalah tinted.

Q: Jika tinted, bagaimana kamu boleh lihat wanita itu dalam bas?

A: Di bahagian pintu penumpang masuk, cermin tingkap itu hanya sedikit sahaja yang tinted. Jika dibandingkan, cermin di bahagian di mana penumpang duduk adalah lebih gelap.

...

Q: Boleh kamu beritahu apa yang kamu boleh lihat pada wanita itu pada 7.10.2000 semasa dia di pintu turun-naik bas?

A: Saya dapat melihat wajahnya dengan lebih jelas.

Q: Sila jelaskan wajah yang kamu maksudkan.

A: Keadaan mukanya dan rambutnya yang berselerak, saya dapat lihatnya dengan lebih jelas.

Q: Bahagian mana mukanya? Sila jelaskan.

A: Saya maksudkan wajahnya. Saya dapat lihat expression – air mukanya – wanita itu kelihatan cemas dan dalam keadaan panik (panic).

In cross-examination PW5 said:

Q: Selepas nampak gambar perempuan dalam surat khabar ini (ID7) dan setelah membaca keratan akhbar ini, anda telah menganggap bahawa perempuan yang anda lihat di dalam bas itu adalah sama seperti perempuan yang kamu lihat di dalam keratan akhbar ini?

A: Saya dapat mengecamnya.

Q: Apabila kamu berada di posisi D, iaitu 23 kaki dari pintu bas yang bertinted, dan dengan keadaan cuaca yang kamu telah katakan tadi, anda dapat mengecam perempuan itu?

A: Ya.

[34] In his grounds of judgment the learned trial judge dealt briefly with the evidence of PW5. He made no reference to the identification of the deceased by PW5. He then went on to say as follows:

> The driver of the 'Kiara' bus that was seen by Devan (PW5) at Jalan Pegaga and Jalan Sambau in the morning of 7 October 2000 was in fact the accused. And I have no doubt whatsoever that the woman that Devan (PW5) saw in the bus that morning at Jalan Pegaga, who appeared to be frantic and was banging her hands on the glass panel of passenger door of the bus, was the deceased, Noor Suzaily. That morning, from inside the bus, she was desparately crying for help. She could not open the passenger door because only the driver, that is the accused, could open it, neither could she open the emergency door, because it was locked.

In the light of the submission advanced by learned counsel what arises for immediate determination is whether the Turnbull directions enunciated in the celebrated case of *R v. Turnbull* [1977] 1 QB 224 must be complied with when the disputed evidence is not that of the accused but that of the victim. In dealing with the circumstances in which the *Turnbull* guidelines become applicable Lord Widgery CJ said in *R v. Turnbull* [1977] 1 QB 224 at p 228:

> ... whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.

And at pp 229-330:

> When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification. ...

The law is clear. The *Turnbull* directions are required when the case against an accused person depends wholly or substantially on the correctness of an identification of him which the defence alleges to be mistaken (see *Jason Cape & Others v. R* [1996] 1 Cr App R 191). The directions need not be confined to cases

involving "fleeting encounters", but are appropriate only where there is some suggestion or possibility of mistaken identification, rather than merely mistaken recollection as to what exactly happened, or who did what (see Andrews & Hirst on *Criminal Evidence*, 4th edn, p 293). When the quality of the identification evidence is poor in such circumstances there must be other evidence which supports the correctness of the identification. However, there may be circumstances when the *Turnbull* directions are required where the disputed indentification is not that of the accused but of another person. In this regard reference may be made to *Criminal Evidence*, 5th edn by May and Powles where it says at p 400:

> *Turnbull*'s case is concerned with the identification of a defendant. However, an analogous direction may be required where identification is in issue, and the identification is not that of the defendant but of another person. In *Bath* [1990] Crim LR 716 the Court of Appeal held that where in such a case there is evidence that at the relevant time the defendant was with another person, the purported identification of the other person should be the subject of a *Turnbull* direction.

And Andrews & Hirst on *Criminal Evidence* 4th edn say at p 294:

> In some circumstances, it is possible that a failure by the trial judge to give an adequate *Turnbull* direction in relation to D(1) may render unsafe the conviction of D(2), even though there was no identification problem in relation to D(2) himself. This was the case in *R v. Elliott* [1986] The Times, August 8, where D(2) admitted his presence at the scene of a burglary, but claimed to have been there for an innocent purpose. The case against him depended upon the allegation that he was the accomplice of D(1), who claimed to have been mistakenly identified, and put forward an alibi defence. A *Turnbull* direction was required in respect of the evidence identifying D(1), but it was not provided, and both convictions were therefore rendered unsafe.

The *Turnbull* directions are therefore necessary to establish the identity of a person who is not the accused only if his identity is relevant to determine the identity of the accused which is in issue.

[35] Thus the primary matter that requires to be addressed is whether the identity of the accused depends wholly or substantially on the correctness of the identification of the deceased by PW5. The answer to that question requires a consideration of the facts of the case. PW9 and PW10 saw some female clothings being thrown out from the bus which at that time

was being driven by the accused. PW12 identified the long skirt (exh. P11A) and the long sleeved T-shirt (exh. P12A) as belonging to the deceased, her daughter. Subsequently the body of the deceased was recovered not far from where the bus had stopped. PW45, while conducting a body search on the accused, found a Motorola Star Tac handphone (exh. P39) on him. There is evidence to show that this handphone belonged to the deceased. The accused also led the police to the recovery of exhs. P46, P47 and P48 and P64. Evidence was adduced to show that these documents belonged to the deceased. PW54 seized a pendant (exh. P36) from the house of the accused. This was identified as belonging to the deceased. PW15 recovered a black bag (exh. P38A) while passing along Lebuh Keluli, a road that was normaly used by the buses of Permata Kiara when returning to the workshop. In the bag were found, *inter alia*, a bank slip (exh. P81) containing the house telephone number of the deceased and a bus ticket (exh. P38D(2)). Evidence was led to show that the bus ticket was issued from the ticket machine of bus bearing registration number WDE 4256 at 8am on 7 October 2000. The DNA evidence showed that the semen of the accused was found in the vagina of the deceased.

[36] The evidence that has been highlighted makes it manifestly patent that the identity of the accused does not depend wholly or substantially on the correctness of the identification of the deceased by PW5. It follows that the identification of the deceased by PW5 can be disregarded in arriving at a verdict. The *Turnbull* directions therefore have no application in law to the facts of the case. Be that as it may, and in any event, the other available evidence lends strong support to the identification evidence of PW5 in order to rule that there has been no mistaken identification by him of the deceased as the person whom he saw in the bus. The objection raised by the defence on this issue cannot therefore be sustained.

(e) The Use Of The Blood Sample Taken From The Accused

[37] It was the stand of the defence that the blood samples taken from the accused for the purpose of conducting the DNA tests were not taken voluntarily. It was argued that even though no evidence was adduced by the accused on this issue the evidence relating to the blood sample must be excluded in the exercise of the discretion of the court as the available evidence shows that he was handcuffed at the time thereby rendering the taking of the blood sample involuntary.

[38] The objection of the defence is anchored on the ground that the evidence relating to the blood sample of the accused must be excluded as it was taken involuntarily. In *R v. Mc Namara* [1951] 99 CCC 107 it was held that there is no analogy between the taking of a blood sample without consent and the taking of a statement which was not voluntary. This, as explained in *AG for Quebec v. Begin* [1955] SCR 593, is because in taking a blood sample the accused does not say anything because he is not asked any question. Thus the question of self-incrimination or involuntariness does not arise. The objection raised must therefore be addressed on the basis of the blood sample of the accused having been taken without his consent. The general rule is that illegally or improperly obtained evidence remains admissible in law if it is relevant to the matters in issue. As Lord Goddard said in *Kuruma v. R* [1955] AC 197 at p 203:

> In their Lordships' opinion the tests to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.

And at p 204:

> In their Lordships' opinion, when it is a question of the admission of evidence strictly it is not whether the method by which it was obtained is tortuous but excusable but whether what has been obtained is relevant to the issue being tried.

In commenting on the discretion to exclude reliable but improperly obtained evidence Lord Diplock said in *R v. Sang* [1980] AC at p 437:

> Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained.

It is therefore clear that the court has no discretion to refuse to admit evidence on the ground that it was illegally obtained if it is relevant. This rule applies, *inter alia*, to cases involving illegal searches, evidence obtained by secret listening devices or by undercover police operations. It also applies to evidence obtained by unfair procedures. Thus in *R v. Apicella* [1986] 82 Cr App R 295 the English Court of Appeal upheld a rape conviction based upon the results of tests carried out on a specimen of body fluid

obtained from the accused for medical reasons whilst he was on remand. In *AG for Quebec v. Begin* [1955] SCR 593 it was held that even if a blood sample was obtained from the accused without his consent it is admissible to prove intoxication. It follows that the evidence relating to the blood sample taken from the accused is admissible as it is relevant even if it was taken without his consent.

[39] It must now be considered whether the evidence should be excluded in the exercise of the general discretion of the court. The existence of this power was recognised in *Kuruma v. R* [1955] AC 197 where Lord Goddard said at p 204:

> No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused.

The discretion to exclude evidence improperly or unfairly obtained from an accused person after the commission of the offence was attributed by Lord Diplock to the principle expressed in the *maxim nemo debet prodere se ipsum* (no one can be required to be his own betrayer) in *R v. Sang* [1980] AC 402 at p 436:

> That is why there is no discretion to exclude evidence discovered as the result of an illegal search, but there is a discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair.

This common law discretion was construed even more narrowly by the House of Lords in *R v. Fox* [1986] AC 281 where Lord Fraser said at p 293:

> Of course, if the appellant had been lured to the police station by some trick or deception, or if the police officers had behaved oppressively towards the appellant, the justices' jurisdiction to exclude otherwise admissible evidence recognised in *Reg v. Sang* [1980] AC 402 might have come into play.

In that case it was argued that specimens of breath which the accused had been "forced" to provide at the police station should be excluded on the principle stated in *R v. Sang* [1980] AC 402 as he had been forced to incriminate himself as a result of an unlawful arrest in his home and the procedures which followed that arrest. In rejecting the argument Lord Bridge said at p. 229:

> If the justices had excluded the evidence of the proportion of alcohol in the specimen they would have improperly exercised their discretion.

It must be observed that except for cases such as *R v. Court* [1962] Crim LR 697 and *R v. Payne* [1963] 3 All ER 848 there appear to be no other English reported cases where this discretion has been exercised.

[40] Be that as it may, the party that is seeking to have evidence excluded in the exercise of the discretion of the court has the onus of showing, on the balance of probabilities, that the discretion should be exercised in its favour (see *PP v. Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401; *Francis Antonysamy v. PP* [2005] 2 CLJ 481). It follows that the party seeking the exclusion of the evidence must satisfy the court that the circumstances are such that the court should exercise its discretion in favour of the party making the application. Neither PW43 nor PW47 were cross-examined by the defence to elicit evidence of circumstances that may weigh in favour of the accused in the exercise of the discretion. Indeed learned counsel conceded that no evidence was adduced by the accused on this issue. However, it was contended that the fact that the accused was handcuffed at the time supports the application. The evidence of PW43 shows that at the time the blood samples were taken the handcuffs were removed. In any event the mere fact of the accused being handcuffed does not on its own disclose any improper conduct on the part of the police to enable a consideration of the exercise of the discretion in favour of the accused. The objection raised therefore has no merit whatsoever.

(f) Sufficiency Of The Evidence Of The Chemist On The Dna Analysis

[41] It was argued by the defence that the evidence of a DNA analyst is one of expert opinion and not of fact. He must therefore explain the grounds of his opinion. Learned counsel said that PW11 merely gave evidence that the result of his analysis is that the DNA profile of the spermatozoa from swabs M6 and M7 and the blood stains from the long pants Q have the same DNA profile matching exactly that of blood specimen D labelled "Hanafi bin Mat Hassan" thus indicating that the DNA were all from the same source. He did not explain the nature and characteristics of all the DNA samples. He did not explain how he deciphered the electrophereogram. He did not explain how he converted the electrophereogram results which were in a graph format into one

of a numerical format as contained in exh. P17. Neither did he explain his calculation on the probabilities of another individual having the same DNA. He merely said that the probability of finding another unrelated individual from the Malaysian Malay population is approximately one in 85 billion. He did not explain this conclusion. He had therefore failed to comply with the requirements of s. 51 of the Evidence Act 1950 ("s. 51"). In support reference was made to *Doheny and Adams v. R* [1997] 1 Cr App R 369 where Phillips LJ said at p 374:

> When the scientist gives evidence it is important that he should not overstep the line which separates his province from that of the jury. He will properly explain to the jury the nature of the match ('the matching DNA characteristics') between the DNA in the crime stain and the DNA in the blood sample taken from the defendant. He will properly, on the basis of empirical statistical data, give the jury the random occurrence ratio – the frequency with which the matching DNA characteristics are likely to be found in the population at large. Provided that he has the necessary data, and the statistical expertise, it may be appropriate for him then to say how many people with the matching characteristics are likely to be found in the United Kingdom – or perhaps in a more limited relevant sub-group, such as, for instance, the Caucasian, sexually active males in the Manchester area.
>
> This will often be the limit of the evidence which he can properly and usefully give. It will then be for the jury to decide, having regard to all the relevant evidence, whether they are sure that it was the defendant who left the crime stain, or whether it is possible that it was left by someone else with the same matching DNA characteristics.

[42] The DNA expert must therefore give evidence on the matching DNA characteristics and the random occurrence ratio. The material parts of the evidence of PW11 with regard to the DNA analysis carried out by him reads as follows:

> Using the PCR (Polymerase Chain Reaction) technique I carried out DNA (Deoxyribo Nucleic Acid) profiling analysis at 9 STR (Short Tandem Repeal) genetic loci, namely, THOI, TPOX, CSFIPO, D3S135S, VWA, PGA, D5S818, D13S317, D7S820 and at amelogenin on blood specimens 'D' and 'M3', swaps 'M6' and 'M7', and blood stains on scarf 'I', and long pants 'Q'. DNA Profiles were successfully developed from all the samples except from the blood stains on scarf 'I'. On comparison, I found the DNA profiles developed from the sperm cells extract on swap

'M6' and 'M7' and the blood stains on long pants 'Q' to match each other and that of blood specimen 'D' labelled 'Hanafi bin Mat Hassan' thus indicating that the DNA identified were all from the same source. The probability of a randomly selected unrelated individual from the Malaysian Malay population having a matching DNA profile is approximately 1 in 85 billion.

I prepared a summary of the DNA profiling result. This is the report (tendered and marked as P17).

...

DNA stands for Deoxyribonacleic Acid. And it is the basic genetic material contained in almost all living cells for the body. DNA is unique for every individual, except for identical twins. So, each person's DNA is different from another person.

Polymerase Chain Reaction or PCR is one of the techniques used in DNA profiling analysis. Basically, what it does is that a small amount of DNA is amplified millions of times and then identified.

DNA profiling is a method of identifying individuals from their genetic material, as all individuals have a unique DNA. By analysing this DNA and the sequences in each and the different loci it is possible to identify individuals.

There are at least 3 – 4 methods available right now for DNA profiling.

The 1st method is RFLP, which stands for Restruction Fragment, Length Polymerphism. This technique identifies one locus at a time and it needs good quality DNA for analysis.

The 2nd method used now by most labs everywhere is the STR typing. STR stands for Short Tandem Repeat. In this technique, only a little amount of DNA is required and therefore is very suitable for forensic work, where highly degraded DNA is encountered.

The other 2 techniques are:

(a) the HLA typing; and

(b) Forensic Mitochondrial DNA analysis

For the purpose of my analysis, I used the STR technique.

In this STR typing, first of all the DNA is extracted from the biological stains; in this case, the blood stains and the seminal stains. The DNA is also extracted from the blood samples that was submitted. After extracting, the amount of DNA obtained is

quantitated. Then the DNA is amplified in a machine and after amplification, the amplified products are run in a machine called the DNA analyser which separates the different DNA products according to their different locus. A computer analyses this data and gives a printout of the alleles present at each of the locus. This printout is called an electrophereogram, and I have tabulated the result sfrom this electrophereogram in my summary (P17). A comparison is then made between the DNA profiles of the stains and the reference blood samples to see if they are similar to one another. If there is a match, then a calculation of the probability of the match is made again using a computer software programme.

Q: Can you explain the summary of the STR in P17?

A: In the tabulated Summary of the results, blood specimen 'B' is the profile obtained and it shows the alleles at the nine different loci. At column 2 (Amelogenin), which indicates the gender of the donor of the blood specimen. And in this case, 'XY' indicates male. 'XX' indicates female. This is detected by the DNA analyser. At column 'THO1' the alleles present are 7 and 10 for blood specimen D.

At column 'TPOX' it is 10 and 11.

At 'CSFIPO' it is 10 and 13.

At 'D3S1358' it is 15 and 16.

At 'vWA' it is 17, 17.

At 'FGA' it is 22, 26.

At 'D5S818' it is 11, 12.

At 'D13S317' it is 8, 9.

At 'D7S820' it is 11, 11.

So all these alleles at the 9 different loci constitute the DNA profile of blood specimen 'D'. And this profile is unique for the donor of this blood specimen.

Similarly, I developed the DNA profile of blood specimen 'M3' and the profile was as in the summary.

(P17 referred to witness)

Q: Besides blood specimen marked 'D', did you do DNA profiling on blood specimen 'M3', Spermatozoa from swab M6 to M7 and the blood stain from long pants 'Q'?

A: Yes.

Q: The result of your DNA profiling is as in the summary that you prepared?

A: Yes.

The result shows that the DNA profile of the spermatozoa from swabs M6 and M7 and the blood stains from long pants 'Q' have the same DNA profile matching exactly that of blood specimen 'D'. This means that all the DNA came from the same source and that is the donor of blood specimen 'D'.

When I say it is a match it means that all the alleles at the 9 different loci are the same.

Q: That means from the numbers in the summary?

A: Yes.

Q: Can you explain why did you put the locus marking THO1, TPOX, and so on, on the first row of the summary? What do they signify?

A: These locus like THO1, TPOX and so on are universally excepted locus for forensic analysis. These are found on different positions of the human chromosomes. So when I amplify the DNA, certain reagents that I used which are called primers detect these locus on the chromosomes. So after detecting the locus they then search for the alleles in the locus. All these are chemical process and the reagents are all obtained commercially.

Q: What actually are 'alleles'?

A: Alleles are certain sections on the locus which define the sequence of DNA at that locus. For example, allele 7 at THOI indicates that there are 7 specific STR repeats at that locus.

As I said earlier, each DNA profile is unique for each individual, except for identical twins. So in the present case, this DNA profile is unique and the probability of finding another unrelated individual from the Malaysian Malay population is approximately one in 85 billion. This is calculated from our Malaysian population database which consists of DNA profiles of randomly selected individuals from all over the country.

[43] The material parts of exh. P17 read as follows:

STR Locus	Amelo-genin	THOI	TPOX	CSFIPO	D3S1358	vWA	FGA	D5S818	D13S317	D7S820
'D' Blood specimen (labelled 'Hanafi b. Mat Hassan')	XY	7, 10	10, 11	10, 13	15, 16	17, 17	22, 26	11, 12	8, 9	11, 11
'M3' Blood specimen (labelled 'Unknown')	XX	7, 10	8, 8	11, 12	15, 17	17, 18	22, 23	10, 11	11, 11	10, 12
'M6' Spermatozoa from swab	XY	7, 10	10, 11	10, 13	15, 16	17, 17	22, 26	11, 12	8, 9	11, 11
'M7' Spermatozoa from swab	XY	7, 10	10, 11	10, 13	15, 16	17, 17	22, 26	11, 12	8, 9	11, 11
'Q' Bloodstain from long pants	XY	7, 10	10, 11	10, 13	15, 16	17, 17	22, 26	11, 12	8, 9	11, 11

[44] The evidence shows that PW11 carried out DNA profiling analysis at nine STR genetic loci. He had also explained how the STR method of analysis is carried out. A computer printout called an electrophereogram gives the number of alleles present at each of the locus. Where the number of alleles in two samples are the same there is said to be a match. Exhibit P17 which is a summary of the DNA profiling result is sufficient to explain the matching DNA characteristics in the samples analysed. This is within the limit of the evidence of PW11 as enunciated in *Doheny and Adams v. R* [1997] Cr App R 369. However learned counsel contended that PW11's evidence did not comply with s. 51. It is incorrect to suggest, as done by learned counsel, that PW11 merely gave evidence of the result of his analysis. He had testified on the various procedures he followed in order to arrive at his conclusion. With regard to learned counsel's argument that PW11 did not explain how he deciphered the electrophereogram nor offer an explanation as to how he converted the electrophereogram results which were in a graph format into one of a numerical format as contained in exh. P17 it is sufficient to refer to PW11's evidence when he said:

> A computer analyses this data and gives a printout of the alleles present at each of the locus. This printout is called an electrophereogram, and I have tabulated the result from this electrophereogram in my summary (P17).

The task of PW11 was only to count the number of alleles present at each of the locus which he had tabulated in his summary. His evidence on the electrophereogram is therefore sufficient. If the defence had felt that the evidence of PW11 was not sufficient he ought to have been cross-examined on the matters now raised. However, the DNA evidence given by PW11 was not subjected to any form of cross-examination. With regard to the random occurrence ratio PW11's evidence is merely that the probability of a randomly selected unrelated individual from the Malaysian Malay population having a matching DNA profile is approximately one in 85 billion. Ordinarily this evidence will not be sufficient as there is no explanation as to how the calculation was arrived at. However, it must be remembered that the object of this evidence is to assess the probabilities of another person having a similar match. Therefore even if another person has a similar match his involvement in the crime will be negatived if the other evidence is sufficient to connect the accused with the crime. Thus it follows

A that the significance of the evidence of the random occurrence ratio depends greatly on the other available evidence. In support reference is made to *Doheny and Adams* [1997] 1 Cr App R 369 where Phillips LJ said at p 373:

> B The signifinance of the DNA evidence will depend critically upon what else is known about the suspect. If he has a convincing alibi at the other end of England at the time of the crime, it will appear highly improbable that he can have been responsible for the crime, despite his matching DNA profile. If, however, he was near the scene of the crime when it was committed, or has been C identified as a suspect because of other evidence which suggests that he may have been responsible for the crime, the DNA evidence becomes significant. The possibility that two of the only 26 men in the United Kingdom with the matching DNA should have been in the vicinity of the crime will seem almost incredible and a comparatively slight nexus between the defendant and the D crime, independent of the DNA, is likely to suffice to present an overall picture to the jury that satisfies them of the defendant's guilt.

And at p. 385:

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> We did not find this evidence impressive, for the Crown experts were able to point to aspects of Mr Webster's approach which were conservative and which tended to balance the points made by Professor Donnelly. But in our view none of these issues have any significance in the context of the Adams appeal. The F complainant had, quite comprehensively, identified one man – the appellant – as her assailant: the telephone call, his voice, his appearance, his clothing. When to this was added the fact that his DNA profile matched the crime stain, no jury could be in doubt that it was he who left that stain, whether the statistics suggested G that there existed one other man, or 10, or even 100 in the United Kingdom with the same DNA profile. There is no merit in the first ground of appeal.

The other evidence adduced in this case is sufficient to connect the accused with the crime. Thus the incomplete evidence of H PW11 on the random occurrence ratio is not significant. The evidence of PW11 on the DNA analysis is therefore sufficient.

[45] All the objections raised by the defence have no merits. In the upshot we dismissed the appeal and confirmed the convictions I and sentences.